lation and control of navigable rivers; to the Committee on Rivers and Harbors.

By Mr. FORNES: Petition of the North Side Board of Trade, New York, favoring the passage of House bill 26677, for the relocation of the pierhead line in the Hudson River between Pier 1 and West Thirtieth Street; to the Committee on Interstate and Foreign Commerce.

Also, petition of Kirtland Bros. & Co., New York, N. Y., and the Northwestern Mutual Life Insurance Co., favoring the passage of House bill 36, affording Federal protection to migratory birds; to the Committee on Agriculture.

By Mr. FULLER: Petition of Coleman Barber, Woodburn, Iowa, favoring the passage of House bill 1339, granting an increase of pension to veterans who lost a limb in the Civil War; to the Committee on Invalid Pensions.

By Mr. HINDS: Petition of Sagadahoc Grange, No. 31, Patrons of Husbandry, Bowdoin, Me., favoring the passage of the Page bill (S. 3) for Federal aid for vocational education; to the Committee on Agriculture.

By Mr. KALANIANAOLE: Petition of the Chamber of Commerce of Honolulu, protesting against the proposed removal of the lighthouse tender *Kukui* from Hawaiian waters; to the Committee on Interstate and Foreign Commerce.

Also, petition of the Chamber of Commerce of Honolulu, favoring the passage of bill making appropriation for the improvement of the Honolulu Island; to the Committee on Rivers and Harbors.

Also, petition of the Chamber of Commerce of Honolulu, favoring the passage of legislation permanently stationing a properly equipped revenue cutter on the Pacific coast; to the Committee on Interstate and Foreign Commerce.

By Mr. LINDSAY: Petition of W. J. Hoggson, New York, favoring the passage of the bill making an appropriation for the Lincoln memorial; to the Committee on the Library.

Also, petition of the Chamber of Commerce of the United States, Washington, D. C., relative to the passage of bill for its incorporation under a Federal charter; to the Committee on the Judiciary.

Also, petition of the Chamber of Commerce of the State of New York, protesting against the passage of Senate bill 7208, proposing changes relative to the carriage of cargo by sea; to the Committee on Interstate and Foreign Commerce.

Also, petition of Coleman Barber, Woodburn, Iowa, favoring the passage of House bill 1339, granting an increase of pension to all veterans of the Civil War who lost an arm or leg; to the Committee on Invalid Pensions.

By Mr. LITTLETON: Petition of the Woman's Christian Temperance Union of Succasunna, N. J., favoring the passage of the Kenyon-Sheppard liquor bill preventing the shipment of liquor into dry territory; to the Committee on the Judiciary.

By Mr. ROBERTS of Massachusetts: Petition of the Cooper League, of Washington Street Baptist Church, Lynn, Mass., favoring the passage of the Kenyon-Sheppard liquor bill preventing the shipment of liquor into dry territory; to the Committee on the Judiciary.

By Mr. SCULLY: Petition of the Farmers' National Congress, Chicago, Ill., protesting against the passage of the section of the Post Office appropriation bill requiring the publishing of circulation lists, stockholders, etc.; to the Committee on the Post Office and Post Roads.

Also, petition of the American Federation of Labor, favoring the passage of Senate bill 3, giving Federal aid to vocational education; to the Committee on Agriculture.

Also, petition of the Grain Dealers' National Association, favoring the passage of Senate bill 957, for the regulation of bills of lading; to the Committee on Interstate and Foreign Commerce.

By Mr. STEVENS of Minnesota: Petition of the Minnesota State Forestry Board, protesting against the passage of legislation transferring the control of national forests to States where such forests are situated; to the Committee on the Public Lands.

By Mr. THAYER: Petition of John E. Gilman, past commander in chief, Grand Army of the Republic, favoring legislation creating a memorial to Lincoln in the form of a "Lincoln way"; to the Committee on the Library.

By Mr. TILSON: Petition of the Connecticut State Board of Education, favoring the passage of Senate bill 3, for Federal aid for vocational education; to the Committee on Agriculture.

By Mr. WICKERSHAM: Petition of resident Alaska fishermen at Ketchikan, favoring the passage of legislation by Congress preventing the setting of fish traps in tidal waters in Alaska; to the Committee on the Territories.

By Mr. WILSON of New York: Petition of Pine Bluff Lodge, No. 305, Brotherhood of Railroad Trainmen, protesting against the passage of the employees' compensation bill; to the Committee on the Judiciary.

SENATE.

TUESDAY, *January 7, 1913.*

Prayer by the Chaplain, Rev. Ulysses G. B. Pierce, D. D.

The Secretary proceeded to read the Journal of yesterday's proceedings, when, on request of Mr. LODGE and by unanimous consent, the further reading was dispensed with and the Journal was approved.

SENATOR FROM TEXAS.

Mr. CULBERSON. I present the credentials of R. M. JOHNSTON, appointed a Senator from Texas by the governor of that State, and ask that they be read and placed on file.

The PRESIDENT pro tempore (Mr. BACON). The Secretary will read the credentials.

The credentials of R. M. JOHNSTON, appointed by the governor of the State of Texas a Senator from that State to fill the unexpired portion of the term ending March 3, 1913, occasioned by the resignation of JOSEPH WELDON BAILEY, were read and ordered to be filed.

Mr. CULBERSON. The Senator appointed is present and ready to take the oath of office.

The PRESIDENT pro tempore. The Senator appointed will present himself at the desk for the purpose of taking the oath.

Mr. JOHNSTON was escorted to the Vice President's desk by Mr. CULBERSON, and the oath prescribed by law having been administered to him, he took his seat in the Senate.

ELECTORS FOR PRESIDENT AND VICE PRESIDENT.

The PRESIDENT pro tempore laid before the Senate a communication from the Secretary of State, transmitting, pursuant to law, an authentic copy of the certificate of ascertainment of electors for President and Vice President appointed in the State of Rhode Island at the election held in that State November 5, 1912, which were ordered to be filed.

MESSAGE FROM THE HOUSE.

A message from the House of Representatives, by D. K. Hempstead, its enrolling clerk, announced that the House had passed the bill (S. 109) to authorize the sale and disposition of the surplus and unallotted lands in the Standing Rock Indian Reservation, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect, with an amendment, in which it requested the concurrence of the Senate.

The message also announced that the House had passed the bill (S. 5674) for the relief of Indians occupying railroad lands, with amendments, in which it requested the concurrence of the Senate.

The message further announced that the House had passed a bill (H. R. 16843) to consolidate the veterinary service, United States Army, and to increase its efficiency, in which it requested the concurrence of the Senate.

PETITIONS AND MEMORIALS.

Mr. CLARK of Wyoming presented resolutions adopted by the Fremont County Wool Growers' Association at a meeting held at Lander, Wyo., favoring an appropriation for the extermination of predatory wild animals, which were referred to the Committee on Agriculture and Forestry.

Mr. BRISTOW presented a memorial of sundry citizens of Glen Elder, Kans., remonstrating against the enactment of legislation providing for the establishment of agricultural extension departments in connection with the agricultural colleges in the several States, which was ordered to lie on the table.

Mr. PERKINS presented a memorial of sundry merchants of Sebastopol, Cal., remonstrating against the enactment of legislation providing for the removal of restricted prices on patented goods, etc., which was referred to the Committee on Patents.

He also presented the petition of Harrison Gray Otis, of Los Angeles, Cal., praying for the adoption of an amendment to the Constitution of the United States prohibiting a third term for President and Vice President, which was referred to the Committee on the Judiciary.

Mr. TOWNSEND (for Mr. SMITH of Michigan) presented a petition of the Christian Endeavor Society of the Congregational Church of Kalamazoo, Mich., and a petition of the congregation of the First United Brethren Church of Grand Rapids, Mich., praying for the passage of the so-called Kenyon-Sheppard interstate liquor bill, which were ordered to lie on the table.

Mr. BURTON. I present a petition of sundry citizens of the State of Ohio, residents of the National Military Home of that State, praying for the adoption of an amendment to the Constitution limiting the tenure of office of Presidents of the United States to one term. I move that the petition be referred to the Committee on the Judiciary.

The motion was agreed to.

Mr. PENROSE presented a petition of the Board of Trade of Philadelphia, Pa., praying for the enactment of legislation providing for the restoration of the American merchant marine, etc., which was referred to the Committee on Commerce.

Mr. BRANDEGEE presented a petition of members of the Rod and Gun Club of Naugatuck, Conn., praying for the enactment of legislation providing for the protection of migratory birds, which was ordered to lie on the table.

He also presented resolutions adopted by the Chamber of Commerce of New Haven, Conn., favoring the present management of the New York, New Haven & Hartford Railroad, which were referred to the Committee on Interstate Commerce.

BILLS INTRODUCED.

Bills were introduced, read the first time, and, by unanimous consent, the second time, and referred as follows:

By Mr. STEPHENSON:

A bill (S. 7990) for the relief of James Easson (with accompanying paper); to the Committee on Claims.

A bill (S. 7991) granting a pension to Mary MacArthur;

A bill (S. 7992) granting a pension to Anna M. Jones;

A bill (S. 7993) granting a pension to Georgianna Tyler (with accompanying paper); and

A bill (S. 7994) granting an increase of pension to Edward Cannavan (with accompanying paper); to the Committee on Pensions.

By Mr. TOWNSEND (for Mr. SMITH of Michigan):

A bill (S. 7995) granting an increase of pension to Charles Herbstreith; and

A bill (S. 7996) granting an increase of pension to Charles A. Voorheis; to the Committee on Pensions.

By Mr. OLIVER:

A bill (S. 7997) authorizing the Secretary of War to donate to the city of Lancaster, Pa., two bronze or brass fieldpieces for the use of the General William S. McCaskey Camp, United Spanish War Veterans; to the Committee on Military Affairs.

By Mr. CLARK of Wyoming:

A bill (S. 7998) to increase the maximum limit of the official bonds which may be required of United States marshals and clerks of United States district courts in certain cases; to the Committee on the Judiciary.

By Mr. NELSON:

A bill (S. 7999) to amend an act entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted," approved February 11, 1903, as amended by an act approved June 25, 1910; and

A bill (S. 8000) providing for publicity in taking evidence under act of July 2, 1890; to the Committee on the Judiciary.

(By request.) A bill (S. 8001) to authorize the adjustment of the accounts of Army officers in certain cases, and for other purposes; to the Committee on Claims.

By Mr. BURTON:

A bill (S. 8002) for the relief of Byron W. Canfield; to the Committee on Military Affairs.

By Mr. SWANSON:

A bill (S. 8003) to provide for the construction, maintenance, and improvement of post roads and rural-delivery routes through the cooperation and joint action of the National Government and the several States in which such post roads or rural-delivery routes may be established; to the Committee on Post Offices and Post Roads.

By Mr. McLEAN:

A bill (S. 8004) granting an increase of pension to Ellen S. Pember (with accompanying papers);

A bill (S. 8005) granting an increase of pension to Elmira H. Cowles (with accompanying papers); and

A bill (S. 8006) granting a pension to Elizabeth Blake (with accompanying papers); to the Committee on Pensions.

By Mr. BRADLEY:

A bill (S. 8008) for the relief of the estate of Leopold Harth, deceased;

A bill (S. 8009) for the relief of the estate of R. G. Potter, deceased;

A bill (S. 8010) for the relief of the fiscal court of Bourbon County, Ky.;

A bill (S. 8011) for the relief of the estate of James E. Morgan, deceased;

A bill (S. 8012) for the relief of the estate of James Sayre, deceased (with accompanying paper); and

A bill (S. 8013) for the relief of the estate of William Robinson, deceased (with accompanying paper); to the Committee on Claims.

A bill (S. 8014) granting an increase of pension to George W. Doan (with accompanying papers);

A bill (S. 8015) granting an increase of pension to Green Hines (with accompanying papers);

A bill (S. 8016) granting an increase of pension to Stephen B. Woodruff (with accompanying papers);

A bill (S. 8017) granting an increase of pension to Marion E. Taber (with accompanying papers);

A bill (S. 8018) granting an increase of pension to Joseph Girdler (with accompanying paper); and

A bill (S. 8019) granting an increase of pension to Nathaniel J. Smith (with accompanying papers); to the Committee on Pensions.

By Mr. LA FOLLETTE:

A bill (S. 8020) to make it unlawful for foreign corporations to own or control the capital stock, bonds, or indebtedness of local public-utility corporations in the District of Columbia; to the Committee on the District of Columbia.

LIMITATION ON CHARGES TO JURIES.

Mr. TILLMAN. I introduce a bill, which I ask may be read twice by its title and referred, with the accompanying papers, to the Committee on the Judiciary.

The bill (S. 8007) to limit United States judges to declaring the law when charging juries was read twice by its title, and, with the accompanying papers, referred to the Committee on the Judiciary.

Mr. TILLMAN. I ask that the bill and accompanying papers be printed in the RECORD.

There being no objection, the bill and accompanying papers were ordered to be printed in the RECORD, as follows:

A bill (S. 8007) to limit United States judges to declaring the law when charging juries.

Be it enacted, etc., That no judge of a court of the United States, in the trial of a civil cause before a jury, shall charge the jury in respect to matters of fact, but shall declare the law.

SEC. 2. That any order which modifies or sets aside the verdict or finding of a jury may be made the subject of judicial review in the same way and by like process as a final order in the cause, this section being intended to authorize a review of the exercise of discretion by the trial judge whenever such discretion is exercised upon a matter which it was the province of the jury to consider and determine.

CORCORAN BUILDING,
Washington, D. C., December 23, 1912.

Hon. B. R. TILLMAN, *Senate Chamber.*

MY DEAR SENATOR: This letter is handed to you with two inclosures, to each of which I wish specially to ask your attention.

One of the inclosures is a copy of a petition which, in behalf of Walter Murphy, I submitted to-day to the Supreme Court of the United States. This petition is self-explanatory. It tells the story of how Walter Murphy has fared in the courts of the District of Columbia in a suit which he brought against the Capital Traction Co. for injuries resulting from an accident that happened to him in connection with one of the cars of that company while he was handling packages of newspapers that were to be transported from the Union Station to news stands in different parts of the city.

In the trial court the judge directed the jury to return a verdict in favor of the Capital Traction Co. The plaintiff appealed from the judgment that was entered against him upon the verdict so rendered, but he was denied a bill of exceptions, and a bill of exceptions in a case at law, as distinguished from a case in equity, is the only means by which to put the rulings of the trial judge upon record in the case; and, unless his exceptions, taken at the trial, were put into the record, the plaintiff's appeal was worthless. The denial to him of a bill of the exceptions which he had taken at the trial was so inappropriate to the facts of his case, so uncalled for by any just principle of law that governs the settlement of bills of exception, and the outcome of his trial and appeal, as approved by the Court of Appeals of the District, is so clearly violative of a sense of right and justice that I offer the case (described in this petition to the Supreme Court of the United States) as a sample of work by the judiciary, the like of which, by making the courts a means of defeating the hearing and determination of causes on their merits in the way that justice requires, has contributed in no small degree to the widespread popular discontent that is beginning to voice itself in a demand for the "recall" of judges and of judicial decisions.

Of course I am hopeful that the Supreme Court of the United States will grant the prayer of the petition and require the case to be certified up for review; but there is no legal duty resting on that court to review the case. The Supreme Court can not undertake to correct all the wrongs that are done in the courts of the United States. Indeed, it was to relieve the Supreme Court and lessen the number of cases to get upon its docket that Congress passed the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891 (26 Stat. L., 826–830), by which act a circuit court of appeals is created in each of the judicial circuits of the United States, and certain classes of cases defined in which the judgments of the circuit courts of appeals are declared to be final, except that of such cases it is made competent for the Supreme Court in any case to require the case to be certified up to itself for review and determination. And the recent "judicial code," entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911 (36 Stat. L., Pt. I, pp. 1087–1169), puts the Court of Appeals of the District of Columbia upon a parity with the circuit courts of appeals so far as the reviewing of its decisions by the Supreme Court of the United States is concerned, section 251 of that act being as follows (p. 1159, ditto):

"In any case in which the judgment or decree of said Court of Appeals of the District of Columbia is made final by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and

authority in the case as if it had been carried by writ of error or appeal to said Supreme Court."

As may be seen from the statutes above cited, the Supreme Court of the United States may, of its own pleasure, on proper petition, order up for review a case which otherwise could not get into that tribunal; but the court is not easily persuaded to reach out in that way for new business, and thereby add to the burdens of its docket, already filled with cases which under the law are entitled to go upon its docket in regular course by appeal or writ of error, namely, cases, speaking generally, which involve the construction or application of the Constitution of the United States or the validity or construction of a statute or treaty of the United States. Twenty-eight petitions praying for writs of certiorari have been presented during the present term of the court, excluding to-day, from different parts of the country, including the District of Columbia, and of this number 27 have been denied and 1 granted; 4 were presented to-day.

If this petition of Walter Murphy should be denied by the Supreme Court of the United States, that will be the end of poor Walter Murphy and his case; but I wanted it to appear that the last word which it was possible for counsel to say in the courts had been said in his behalf. I wanted the case to be thus singled out and embalmed, to stand as a memorial of what it is possible for judges, using the machinery of the courts, to do with the most valued and sacred of personal rights when such rights are taken into the courts for adjudication.

Now, permit me a few words more concerning some of the work done in the courts of the District of Columbia, under the appellate authority and supervision of the Court of Appeals of the District, and I will be ready to speak specially of the second inclosure which this letter contains.

On the same day that the court of appeals announced its decision in the case of Walter Murphy it announced its decision in another negligence case, in which there had been a directed verdict in the trial court, namely, the case of Ross against the Washington Railway & Electric Co.

In the summer of 1909 the Washington Railway & Electric Co. had the streets torn up, relaying its tracks and roadbed from Fifth and F Streets NW. to P Street and Dupont Circle. The tracks from Fifth Street run along F Street to Fourteenth; then up Fourteenth to H; then along H from Fourteenth to Seventeenth, where they turn north until they enter Connecticut Avenue, which they follow to P and Dupont Circle. For weeks H Street was in a torn-up condition in the neighborhood of Vermont Avenue, where Miss Janet Ross daily crossed H Street on her way to and from the War Department, in which she was employed. Sometimes she crossed on a driveway placed for teams. On the day in question, there being no footway for pedestrians and no driveway for teams, and nothing in the way of a crossing appearing in sight as far as the eye could reach—east to Fourteenth Street and west to Seventeenth Street—she did as many other persons were doing at the time—it being about 4.35 p. m., immediately after the daily discharge of the hundreds of employees of the State, War, Navy, and Treasury Departments—namely, she started to cross the street, picking her way as carefully as she could. Suddenly, as she was in the act of stepping for the last rail in her passage across, she slipped and fell, seriously injuring herself in the fall.

It is the duty of the street car company, under the statutory terms of its charter, to keep the part of the street occupied by its tracks, including on each side of its tracks a space of 2 feet beyond the outer rail of the tracks, well paved and in good order; and it is also the duty of the street car company, when repairing its roadbed and tracks, so to conduct its work that the usefulness of the highway for the general public will be impaired in as small a degree as possible. At the time Miss Ross was hurt breaches of this duty were in evidence as far as the eye could reach, both to the east and to the west—no footways or temporary crossings in sight for either men or horses. In the midst of this negligence on the part of the street car company the lady, using such care as was possible in the crossing of the street under such circumstances, suddenly, so quickly that she was not aware of what particular feature or item of the situation caused it, finds that she has fallen and sustained bruises and strains and injuries such as could not have happened if the street had been in fit condition for use or provided with proper facilities for passage. Now, think of it. A jury under such circumstances is not to be trusted to pass upon the negligence or the lack of it in either plaintiff or defendant and to say whether it was the defendant's negligence that was responsible for the accident that befell the plaintiff. The trial judge, in directing a verdict for the street car company, himself drew the conclusion and acted upon it that the plaintiff was herself guilty of contributory negligence in undertaking to cross the street in the condition it was in, but the court of appeals, in affirming the judgment of the trial court, rests its decision upon the ground that the work of the street car company was under the supervision and subject to the control of the Commissioners of the District, and that it did not appear that the commissioners had ordered or directed anything to be done which the company had failed to do, and that the company was not therefore to be charged with negligence in the manner of doing its work.

Think of such an announcement of law given out to sustain a directed verdict in a negligence case. As well say that a street car company, where the speed limit in force is 8 miles an hour, can run a car along the street at a place where the street is congested with traffic at the rate, say, of 6 miles an hour, and, if sued by some one who has sustained damage by reason of the speed at which the car was going, plead in justification that the car was going only at the rate of 6 miles an hour, whereas under the municipal regulation it had the right to go as fast as 8 miles an hour, as if even 3 miles an hour at some times and places and under some circumstances might not be negligence of the grossest kind, the truth being that negligence, or what is the same thing—the lack of ordinary care befitting the circumstances—is essentially a fact determinable by the jury in the light of the facts and circumstances of the particular situation.

True, the Ross case might have been laid before the Supreme Court of the United States and a certiorari prayed for, but to what effect? Could it be reasonably expected of the Supreme Court that it would order the Ross case up for review? The utmost that could be done in the Ross case would be, in phrasing a petition to the Supreme Court, to keep in mind the frequency with which directed verdicts are ordered and approved in this jurisdiction, and, treating the Ross case only as a symptom of the trouble that needs attention, pray the court, since all such cases can not be ordered up for review, to make use of the Ross case and render a decision therein that shall thereafter be helpful to the lower courts. But to this course—overlooking for the moment the lady herself, who by this time might, like a great many others, be too much discouraged with the courts to go further in her efforts—there was a two-fold objection: First, if the case were ordered up and reviewed by the Supreme Court and the lower court reversed, there is no guaranty, judging the future by the past, that there would be any permanent or lasting good effects, as I will illustrate in a moment; second, the petition, if made, would in all probability be denied, and I did not propose—the client eliminated from consideration in the matter—that those who shall undertake to oppose what I shall suggest as a needed remedy, should have it in their power to say that the Supreme Court, by refusing on such a petition to review the case, had thereby given its tacit approval to the doings of the lower court. I did not want anybody to have opportunity thus to misinterpret the meaning of its action, if such action should be taken by the Supreme Court. Further, what constitutes negligence is so peculiar to each case, negligence being something which the facts and circumstances of the particular case must determine, that a decision in one case will not necessarily afford the criteria for deciding another case. And hence, if a judge has reached the point that he thinks it to be his duty himself to consider the force and effect of evidence, and himself to draw the deductions which, to his mind, all reasonable men must draw from the evidence, a reversal of him in one negligence case will not very seriously influence or affect him in another.

Let me illustrate this matter of directed verdicts with another case or two that may be seen in the reports. Take the case of Mosheuvel *v.* District of Columbia, reported in 17 App. D. C., 401, and in 191 U. S., 247. In this case, a hole resulting from an uncovered water box in the sidewalk was at the foot of three steps which led to the sidewalk from a brick-paved landing at the front of the house in which Mrs. Mosheuvel lived. The box was about 4 inches square, projecting irregularly above the level of the street, and was without covering of any kind. Its condition was well known both to Mrs. Mosheuvel, the plaintiff, and to the District authorities. It was situated about the middle of the steps from her house, and in going from the house it was necessary to go either to the right or to the left of the box, which it would be perfectly safe to do, or to step over the box and clear it. The plaintiff testified that, on the day in question, from the time she left her door, she had the box in view a part of the time, and had it in mind all the time, and remembered its dangerous character, but that, on this occasion, she attempted to step over it instead of going to one side; that she did not take a sufficiently long step, and her foot went into the hole, and she was thrown, with the result that she suffered serious injury.

In the trial court the judge directed the jury to return a verdict in favor of the defendant, and the Court of Appeals of the District, in affirming the judgment which had been entered on the verdict so directed, makes use of the following language (p. 406, ditto):

"Despite the fact that the negligence of the District has been great and is almost confessed on the record, we can find no difference in principle between this case and that of Brewer *v.* District of Columbia (7 App. D. C., 113) upon the authority of which the court below proceeded.

"In pursuance of the decision in the Brewer case, we must affirm, with costs, the judgment of the Supreme Court of the District of Columbia in the premises."

The case, on a writ of error, was taken to the Supreme Court of the United States, and that court in reversing the lower court concludes its opinion in these words (p. 266, ditto):

"Was the situation of the water box and the hazard to result from an attempt to step over it so great that the plaintiff, with the knowledge of the situation, could not, as a reasonably prudent person, have elected to step across the box instead of stepping to the sidewalk from either side of the tread of the last step? And this, we think, was, under the undisputed proof, a question for the jury and not for the court."

The jolt administered by the Supreme Court of the United States in the reversal of the above judgment was shortly followed by another jolt in the case of Chunn *v.* The City & Suburban Railway, reported in 23 Appeals District of Columbia, 551, and in 207 United States, 302. It was a writ of error also which took this case to the Supreme Court of the United States.

The plaintiff in this case was a young woman, who for a year or more before the accident which befell her had lived and worked at Riverdale, in Maryland, coming into Washington now and then on the cars of the City & Suburban Railway. The platform from which persons traveling from Riverdale to Washington boarded the cars, consisted of boards laid on the ground, with sleepers under them, and extended 30 feet lengthwise along the tracks. This platform covered the space between the tracks, also the space between the rails of the tracks, and extended the width of two boards outside the outer tracks. The distance between the inner rails of the two tracks was 7 feet and 10 inches. The steps of the cars projected 2 feet and 2 inches beyond the tracks, leaving, when two cars passed each other at that point, a clear space between them of 3 feet and 6 inches. One standing on the platform at that point could see or be seen for a distance of at least a quarter of a mile north or south along the tracks.

As the car for Washington approached from the north, the young woman who wished to board it went to the platform and stood between the tracks. There were other persons intending to take the car, one of whom was near her and also between the tracks. As the car for Washington came from the north, another of defendant's cars came from the south. The Washington car slowed down and came to a stop just as the latter car, without stopping, ran by "at a rapid rate of speed"; one witness said "12 to 15 miles an hour." No one saw exactly what happened to the plaintiff, who was standing near the north end of the platform, but the sound of "a shock" was heard, and the plaintiff was found unconscious between the tracks 10 or 15 feet north of the north end of the platform.

At the trial of the case in court the other person, who was standing between the tracks, testified, "There was ample room to stand if you were thinking what you were doing"; "I realized that I would have to hold myself strictly in the center of the two tracks."

The judge in the trial court directed the jury to render a verdict in favor of the railway company, and the Court of Appeals of the District, in affirming the judgment entered on that verdict, uses the following language (23 App. D. C., 564):

"Carefully considering the evidence in the light of all reasonable inferences that can be drawn from its undisputed facts, our conclusion is that the plaintiff's injuries were the result of her own want of ordinary care. * * * Plaintiff had no recollection of what she was doing or where she was standing at the time. It does not appear that she was deficient in intellect, and she ought to have seen the car and exercised her thought, as did her witness. * * * Being of the opinion that the trial court was right in directing the verdict upon the ground of the plaintiff's contributory negligence, the judgment will be affirmed with costs."

Look at the above language again and see with what assurance the judges undertook to perform the function of the jury, going so far as to say of the plaintiff, "It does not appear that she was deficient in intellect, and she ought to have seen the car and exercised her thought."

Read now what the Supreme Court of the United States had to say concerning the above judgment of the court of appeals, pronounced on an issue which was properly determinable by the jury in the trial court (207 U. S., 307):

"A jury might well say that under such circumstances reasonable care demanded—of the defendant company—the exercise of the utmost vigilance, foresight, and precaution. The motorman of the northbound car could see plainly that the car for Washington was about to stop and that passengers were standing upon the space between the tracks intending to enter it. He might readily have understood that the noise of the transit of the two cars would be commingled, and that those who intended to enter the other car would naturally direct their attention to it, and might fail to notice the approach of his own car. In point of fact, the motorman took no precaution whatever; he assumed that those who were standing on the platform would take care of themselves, and ran his car by them at full speed, as if oblivious of their existence. * * * Nor was the plaintiff necessarily wanting in due care by taking her place between the tracks. It was the usual place from which entrance to the Washington car was made. It was safe enough under ordinary circumstances. It was made unsafe only by reason of the defendant's negligent act in running another car rapidly by. The plaintiff had the right to assume that the defendant would not commit such an act of negligence, and that when it stopped one car and thereby invited her to enter it, it would not run another rapidly by the place of her entrance and put her in peril. We think that it can not be said, as a matter of law, that the plaintiff was guilty of contributory negligence. That issue with the others in the case should have been submitted to the jury with appropriate instructions. * * *

"The judgment is reversed and the case remanded to the court of appeals, with directions to reverse the judgment of the Supreme Court of the District of Columbia and remand the cause to that court with a direction to set aside the verdict and award a new trial."

While on the subject of directed verdicts, let me illustrate the matter further with a case or two which did not arise in the District of Columbia, for the evil to which I am now calling attention is not confined to the District of Columbia, the action of inferior judges of the courts of the United States, more than all other causes combined, being what primarily and chiefly is responsible for the demand, now heard in all parts of the country, that the judicial system be reformed. The case of Kane *v.* Northern Central Ry. Co. (128 U. S., 91) came before the Supreme Court of the United States on a writ of error to the Circuit Court of the United States for the Eastern District of Pensylvania.

In that case a missing step had caused a brakeman in clambering down between two cars of a freight train to fall and lose both legs. In his suit against the railroad company it appeared from the brakeman's own testimony that he knew that the step was missing, having called the attention of the conductor to the fact only a few hours before, and that, had he thought of the missing step at the moment he sought to use it, he might have pulled himself back with his hands or have "slid down" on the brake rod, for he had before climbed up and down by holding that rod with one hand and putting his foot against it and pulling himself up until he touched the running board. The trial judge at once saw contributory negligence, and directed a verdict for the defendant. Says the Supreme Court (p. 96):

"We are of the opinion that the court erred in not submitting to the jury to determine whether the plaintiff, in forgetting or not recalling at the precise moment the fact that the car from which he attempted to let himself down was the one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling and under the circumstances in which he was placed."

Likewise in Jones *v.* East Tennessee, Virginia & Georgia Railroad Co. (128 U. S., 443), in error to the Circuit Court of the United States for the Eastern District of Tennessee, the trial court, in directing a verdict for the defendant expressed itself as follows (p. 444):

"In the judgment of this court, based upon the facts shown in evidence and not controverted by the argument, touching the manner of plaintiff's collision with defendant's engine, the plaintiff was guilty of such contributory negligence as precludes him from all right to recover in this action. The court therefore instructs you to return a verdict for the defendant."

Says the Supreme Court (p. 446):

"Instead of the course here pursued a due regard for the respective functions of the court and the jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

True, the Supreme Court of the United States has said that, where the facts are such that all reasonable men must draw from them the same conclusion, the question of negligence may properly be regarded as one of law for the court; it has also said that, if the evidence is such that the court would not permit a contrary verdict to stand if rendered, the court may itself direct the verdict without submitting the matter to the jury. But such words are to be read and understood in the light of the circumstances under which uttered and not given too broad or general an application. Once let a judge or a court, feeding on words such as may be found here and there in opinions of the courts of last resort, become imbued with the notion that it is the function of judges to consider what the inference or deduction is that all reasonable men must draw from the facts appearing in evidence, and you will soon have judicial exemplifications of the old Bible proverb, "Seest thou a man wise in his own conceit? There is more hope of a fool than of him."

Because I speak plainly on this subject, do not suppose for one moment that I am among those who advocate a popular recall as the necessary remedy to correct conditions which, in the courts, need correction, and which, in the end, most certainly will be corrected. It is because I want to see the remedy found (as it can be) without resort to so radical an innovation on the branch, which, of all others of our representative government, ought to be preserved from the turmoil of the hustings, that I am speaking as I am. Of course, every branch of our Government, the judiciary as well as the executive and the legislative, must find the highest law eventually in the will of the people which is back of the Constitution and which is competent to make constitutions and to amend them. But let us not put into the dust and contests of the arena questions which ought to be determined within the precincts of a temple dedicated to justice where the judges of the law and the triers of the fact can meet together as integral parts of the tribunal to whose findings and judgment are committed the dearest rights of the citizen.

However, our present system, it may be remarked in passing, is not limited, as concerns the recalling of judges, to the one method of an impeachment proceeding such as the House of Representatives, as to one judge, is now pursuing before the Senate of the United States. During the Civil War the whole of the District of Columbia judiciary, good as well as bad, was removed from office at one time. In the case I refer to, it was not an abolishment of a court and a saving of the judges, as in the case of the recent Court of Commerce, but the saving of the court, under another name, and the turning out of the judges. I will show you the matter by references.

The original organic act entitled, "An act concerning the District of Columbia," approved February 27, 1801 (2 Stat. L., 103), had provided in section 3:

"That there shall be a court in said District, which shall be called the circuit court of the District of Columbia; and the said court and the judges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States. Said court shall consist of one chief judge and two assistant judges, resident within said District, to hold their respective offices during good behavior."

The act entitled, "An act to amend the judicial system of the United States," approved April 29, 1802 (2 Stat. L., 156), had provided in section 24:

"That the chief judge of the District of Columbia shall hold a district court of the United States, in and for the said District, on the first Tuesday of April and on the first Tuesday of October in every year; which court shall have and exercise, within the said District, the same powers and jurisdiction which are by law vested in the district courts of the United States."

And the act entitled, "An act to establish a criminal court in the District of Columbia," approved July 7, 1838 (5 Stat. L., 306), transferred all criminal business pending in the circuit court to the criminal court then created and provided:

"The said criminal court shall have all the jurisdiction in the said counties, respectively (the county of Washington and the county of Alexandria, which then constituted the District of Columbia), now held by the said circuit court in the said counties, respectively, for the trial and punishment of all crimes and offenses, and the recovery of all fines, forfeitures, and recognizances."

Section 5 of the above act gave the circuit court authority to review, by writ of error, the judgments of the criminal court.

And then came the act entitled, "An act to reorganize the courts in the District of Columbia, and for other purposes," approved March 3, 1863 (12 Stat. L., 762), in section 1 of which act it was provided:

"That there shall be established in the District a court to be called the Supreme Court of the District of Columbia, which shall have general jurisdiction in law and equity. It shall consist of four justices, one of whom shall be denominated as chief justice."

And in section 16 of that act it was provided:

"That the Circuit Court, District Court, and Criminal Court of the District of Columbia are hereby abolished. All laws and parts of laws relating to said courts, so far as the same are applicable to the courts created by this act, are hereby continued in force in respect to such courts, and all other laws and parts of laws relating to said circuit, district, and criminal courts are repealed."

The Supreme Court of the District of Columbia, created with four judges, as above mentioned, is the present Supreme Court of the District, the judges having since been increased to six. The appellate jurisdiction, which, on its organization, was vested in the general term of the Supreme Court of the District, where the judges sat in banc (two or more), as distinguished from the special terms, where the individual judges sat to hear and try cases, was taken away by the act entitled "An act to establish a Court of Appeals for the District of Columbia, and for other purposes," approved February 9, 1893 (27 Stat. L., 434), this latter act being the one which called into existence the present Court of Appeals of the District of Columbia.

To recur to the matter of directed verdicts in negligence cases—a right of appeal, as already illustrated, does not afford of itself a sufficient remedy. Many parties against whom directed verdicts are rendered become disheartened at once, and many are wholly unable to pay the costs of even at first appeal, much less of a further appeal, such as was formerly permitted to the Supreme Court of the United States. As long as judges, whether the bench they sit on is in a trial court or in an appellate court, are allowed to make deductions and draw conclusions concerning issues whose determination is properly for the men who constitute the jury the evil will be present, and unless severely checked a constantly growing one, for the judges always declare their own deductions and conclusions to be what the law itself says concerning the facts in evidence; and every time an appellate court, in affirming a directed verdict, adds something to the already existing declarations of what is to be regarded as negligence in the view of the law—that is, in the view of the judges themselves—that much additional ground is taken from the jury and added to the domain of judge-made law, which law is itself made to do duty in future adjudications; and so the evil grows. I wish to suggest that the encroachment of judges upon the domain of the jury ought to be stopped by positive law. And this brings me to the second inclosure contained in this communication.

This second inclosure, as you will observe, is the draft of a bill to limit judges to declaring the law when charging juries. If such a bill as is here suggested were enacted into law, a judge who wished to decide the issue himself, thinking the plaintiff had not made out a case, would find that, instead of directing a verdict for the defendant, he must order a nonsuit of the plaintiff. And the act of the trial judge, viewed from the standpoint of a nonsuit, would appear in a very different light than when viewed from the standpoint of a directed verdict. Too often in the case of a directed verdict the question considered by the appellate court is, Did the trial judge draw the correct conclusion from the evidence? Whether he did or did not is the question which properly was answerable by the jury. In the case of a nonsuit, the question to be considered by the appellate court would be, Was there any evidence in the case for the consideration of the jury? If there was, the case should have gone to the jury, for it is immaterial, if there was evidence for the jury, whether the conclusion of the judge upon the evidence was correct or incorrect.

The inclosed draft provides also, as you will observe, that orders which modify or set aside the verdicts of juries may be reviewed. This provision is intended to meet the case where a judge, finding himself unable to direct a verdict, may submit the case to the jury, and then, if the verdict turned in by the jury does not suit him, set it aside. At present, the power of the trial judge in civil cases to set verdicts aside is absolute, and such power, no matter how arbitrarily

or capriciously used, is not subject to review or control. And the practice has become quite common for the judge, if he personally thinks that a verdict is too large, to order it set aside as excessive, unless the plaintiff will remit the amount which the judge shall say is excessive.

The provision of the inclosed draft on this point would not prevent judges from dealing with verdicts in such manner as may be proper; it simply makes the discretion of the trial judge a subject of judicial review when exercised upon work done by the jury.

No good reason exists why a bill of the kind here suggested should not be enacted into law. It would be the means of removing from trial judges all invitations, which motions to direct verdicts extend to them, to trespass upon the ground of the jury. It would also be the means of freeing the courts, in part at least, from the notion, which is fast taking hold of the popular mind, that judges of the lower courts of the United States, who are allowed to hold their office for life, arrogate to themselves too much authority in passing upon and disposing of the rights of the individual citizen.

Let me say, in conclusion, that in our common-law system of jurisprudence the jury is as much an integral part of the court as the judge on the bench, the two together constituting the tribunal whose function it is to pass upon and settle all issues raised by litigants, whether of law or of fact. The system does not contemplate that the judge on the bench shall make of himself a thirteenth juror, to displace with his own judgment the 12 other men to whose concurring judgment the law commits the finding upon all issues of fact. It is the province of the judge to say what shall and what shall not be admitted as evidence in the cause, but the credibility of the evidence, the weight to be given to it, the inferences and deductions to be drawn from it as affecting the issue of fact to be determined, are matters within the province of the jury. And that the functions of the jury may not be minimized, even though the facts in evidence may be undisputed, let me quote the following passage from the opinion of the Supreme Court of the United States in Railroad Co. *v.* Stout (17 Wall., 657, 664):

"Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard—the merchant, the mechanic, the farmer, the laborer—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that 12 men know more of the common affairs of life than does 1 man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

If judges who sit in trial courts would only ponder more carefully the utterances above quoted concerning the functions of the jury, there would be fewer attempts to direct verdicts.

I am, yours, very truly,

JOHN ALTHEUS JOHNSON.

IN THE SUPREME COURT OF THE UNITED STATES.

(October term, 1912.)

Walter Murphy, petitioner, *v.* Ashley M. Gould, an associate justice of the Supreme Court of the District of Columbia, respondent.

MOTION THAT LEAVE BE GRANTED TO WALTER MURPHY TO PRESENT PETITION PRAYING FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Comes now into this honorable court Mr. John Altheus Johnson, admitted by this honorable court as an attorney and counsellor at law. And he moves that leave be granted to Walter Murphy to present to this honorable court a petition praying for a writ of certiorari to the Court of Appeals of the District of Columbia.

And the counsellor aforesaid submits with his motion a copy of the said petition.

JOHN ALTHEUS JOHNSON.

Please take notice that the above is the tenor of a motion which, on Monday, the 23d day of December, 1912, at 12 o'clock noon, or as soon thereafter as counsel can be heard, I shall submit to the Supreme Court of the United States.

I hand you herewith a copy of the petition referred to in the said motion.

JOHN ALTHEUS JOHNSON.

DECEMBER 4, 1912.

To Mr. FREDERIC D. MCKENNEY,
Attorney for the Hon. Ashley M. Gould, and
To Mr. R. ROSS PERRY,
Attorney for the Capital Traction Co.

Copy received December 4, 1912.

R. ROSS PERRY.

Petition of Walter Murphy, a citizen of the United States, 26 years of age, born in the District of Columbia and resident therein.

To the honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Humbly presenting myself before your honors, with this, my petition, I crave leave to state:

1. "Not to me returns
Day, or the sweet approach of ev'n or morn,
Or sight of vernal bloom, or summer's rose,
Or flocks, or herds, or human face divine;
But cloud instead, and ever-during dark
Surrounds me, from the cheerful ways of men
Cut off."

2. My blindness is the result of negligence by the Capital Traction Co. in the manipulation of one of its street cars near the Union Station, in the city of Washington, on December 2, 1909.

3. A suit in damages which I had brought on February 25, 1910, in the Supreme Court of the District of Columbia against the Capital Traction Co. for the injury I had received as the result of its negligent act came to trial in June, 1912, before Associate Justice Ashley M. Gould, of that court, and a jury, and ended on the 19th day of that month in a verdict, which the jury, *by direction of the court*, rendered in favor of the said Capital Traction Co. On July 2, 1912, judgment was entered on the said verdict in favor of the said company.

4. During the progress of the trial several rulings were made by the justice aforesaid upon questions of law arising upon the trial, to which rulings the counsel by whom I was represented at the time they were made and before the jury had retired took exceptions, and the exceptions thus taken, I am informed and believe, were duly noted on the minutes of the presiding justice aforesaid.

5. On July 19, 1912, through counsel I prayed in open court an appeal to the Court of Appeals of the District of Columbia from the judgment aforesaid of July 2, and the said appeal was duly perfected on July 26, 1912.

6. A rule of the Supreme Court of the District of Columbia says that the bill of exceptions, if not settled before the jury retires, "shall be submitted to the court within 38 days after judgment shall have been entered unless the court shall, for cause shown, extend the time."

The summer vacation period of the Supreme Court of the District of Columbia, as arranged by the justices of the said court, has consisted for several years past of the three months of July, August, and September, during which period each of the six justices performs a service upon the bench of two weeks, each justice knowing by prearrangement in the early part of the summer the portion of time he is to occupy the bench during the summer recess, and at such time he attends to business, so far as it is competent or proper for him to act thereon, in all the branches of the court. During the summer vacation of 1912 the bench, from Friday, August 16, to Friday, August 30, was occupied by Justice Ashley M. Gould, and from Monday, September 16, to and including Monday, September 30, by Chief Justice Harry M. Clabaugh.

On August 19, 1912, it being still the same term of the court at which the trial was had of my aforesaid suit against the Capital Traction Co., the said Supreme Court of the District entered an order in the cause in the words following, to wit:

"For good cause shown the time within which to submit to the court the bill of exceptions taken at the trial of this cause is hereby extended to and including the 20th day of September, 1912."

On September 19, 1912, one of the counsel by whom I was represented in the case, "rising in open court" (I quote from what is of record in the case in court, a copy of which record, to be hereinafter referred to, is attached to this petition), "with the bill of exceptions in his hand, stated to the court (Mr. Chief Justice Clabaugh sitting) that he had a bill of exceptions in a case which had been tried before Mr. Justice Gould, who would be the proper one to settle and sign it; that the matter would have to await the return of Justice Gould, but that the time to submit the bill would, under an order of the court, expire the next day; that counsel desired the record to show that the bill was then submitted, and that proper notice would be given to counsel on the other side of the time for settling it. The chief justice thereupon stated, as a direction to the clerk, 'Bill of exceptions submitted,' and counsel for the plaintiff then, in open court, handed the bill of exceptions to the clerk, who had received the order of the court in the premises." And the minute entry of the said submission, as made in the cause aforesaid, is in the words following, to wit:

"Comes now the plaintiff, by his attorneys of record, and submits to the court the bill of exceptions taken at the trial of this cause."

As the rule of the said supreme court contemplates that a bill of exceptions shall not be settled except upon notice to opposing counsel, that notice to be given for a time that shall be at least eight days after a copy of the bill shall have been presented to such counsel, I thereafter, to wit, on September 26, 1912, through my counsel, gave to counsel for the Capital Traction Co. a notice in writing of the time at which Justice Gould would be asked to settle and sign the said bill, that notice being in the words following, to wit:

"Take notice, that on Tuesday, October 1, 1912, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, counsel for the plaintiff will ask Mr. Justice Gould to settle and sign the bill of exceptions which was submitted to the court in the above-entitled cause on September 19, 1912, a copy of which bill was presented to you on September 18, 1912."

October 1, the day designated in the said notice (and the earliest day, by reason of his absence from the city, at which Justice Gould, the only person who could settle and sign the bill, would be available), was the beginning of another term of the court, September 30 being the end of the April term, which was the trial term of the cause aforesaid, the first Tuesday in October, which in 1912 fell on the 1st day of the month, being the beginning of the next succeeding term, which is the October term of the court.

On September 26, 1912, the same day the aforesaid notice was given of the time at which it was proposed that the bill of exceptions should be settled, I filed through counsel a motion in the cause asking for a two-day extension of the April or trial term of the court, counsel explaining that the purpose of the motion was to enable the bill of exceptions, at the same term of the court at which the exceptions were taken, to be put actually, for settlement and signature, into the hands of the very judge who must settle and sign; and when this motion was considered and acted upon by the court it was ordered:

"That an extension be, and the same hereby is, made of the said April term of the circuit court, so as to cause the said term to extend to and include the 2d day of October, 1912."

On October 1, 1912, in accordance with the terms of the notice aforesaid, I presented, through counsel, my bill of exceptions to Justice Ashley M. Gould, with the request that he settle and sign the same.

7. On September 23, 1912, counsel for the Capital Traction Co. had filed a motion in the said Supreme Court of the District of Columbia to strike out the bill of exceptions, which I had tendered as aforesaid, on the ground (*a*) "that two days' notice in writing to counsel for the defendant of the time at which it was proposed to submit the said bill of exceptions to the court to be settled, as required by common-law rule No. 48 of this court, was not given to the said counsel for the defendant nor to any of them, nor was any other notice given in accordance with the said rule of court; and (*b*) that neither the said proposed bill nor a copy thereof was presented to counsel for the defendant nor to any of them at least eight days before the said 19th day of September, 1912, nor was the proposed bill or a copy thereof presented at any time to counsel for the defendant or to any of them prior to the 18th day of September, 1912."

Common-law rule 48 of the rules of the Supreme Court of the District of Columbia, thus referred to, reads as follows:

"48.

"1. The bill of exceptions shall be prepared by counsel. If not settled before the jury retires, counsel tendering it shall give two days' notice in writing to opposing counsel of the time at which it is proposed to submit the same to the court to be settled, and shall also at least eight days before the time designated in such notice present to opposing counsel the proposed bill or a copy thereof. The bill shall be submitted to the court within 38 days after judgment shall have been entered, unless the court shall, for cause shown, extend the time.

"2. The fact of the settling and filing of the bill of exceptions shall be noted in the minutes of the court.

"3. If the court is unable to settle the bill of exceptions, a new trial shall be granted.

"4. The submission, settling, signing, or filing of a bill of exceptions shall not be affected by the expiration of any term, provided this rule is complied with.

"5. This rule shall apply to pending cases."

The motion to strike out, made as above stated, was, on September 30, 1912, by the chief justice then holding the several branches of the Supreme Court of the District, set for hearing on October 11, 1912.

On October 1, 1912, Justice Ashley M. Gould, to whom on that day my said bill of exceptions, as hereinbefore stated, was tendered to be settled and signed under the submission of it which had been made to the court on September 19, 1912, and of the notice to opposing counsel of September 26, as hereinbefore mentioned, received the same into his personal custody, but delayed action thereon until October 11, 1912, when the aforesaid motion to strike out came before him for consideration; and he thereupon, to wit, on October 16, 1912, refused to consider the said bill of exceptions and ordered the same to be stricken from the files of the court, on the sole ground "that neither the said proposed bill of exceptions, nor a copy thereof, was presented to counsel for the defendant at least eight days before the said bill of exceptions was submitted to the court," the order which the court passed in the premises being in the words following, to wit:

"It appearing to the court that the said bill of exceptions was not settled before the jury retired in the above-entitled cause, and that the time for submitting the same was extended by the court until and including the 20th day of September, 1912, and that the same was submitted by counsel for the plaintiff to the court on the 19th day of September, 1912, and that the notice thereof prescribed by common law rule No. 48 of this court was not given to counsel for the defendant herein, and that neither the said proposed bill of exceptions nor a copy thereof was presented to counsel for the defendant at least eight days before the said bill of exceptions was submitted as aforesaid; it is by the court, this 16th day of October, 1912, ordered that the said bill of exceptions be, and the same is hereby, stricken from the files of this court."

8. Upon the making by Justice Gould of the order aforesaid of October 16, 1912, I was advised by counsel that the appeal I had taken from the judgment of the Supreme Court of the District of Columbia of July 2, 1912, would be worthless, the record in the case not disclosing reversible error, unless the rulings of the said justice, made during the progress of the trial, to which through counsel I had duly excepted, could be put into the record by a proper bill of exceptions. Having, as I have stated, sought of him such a bill and been refused the same, I thought to invoke in that regard the aid of the Court of Appeals of the District of Columbia. I therefore, on October 22, 1912, presented a petition to the said court of appeals, wherein I prayed the said court to make use of the writ of mandamus and command the said Ashley M. Gould, as an associate justice of the Supreme Court of the District of Columbia, to settle the bill of exceptions which I had tendered to him as aforesaid, according to the truth of the matters which took place before him on the trial of the cause at law, No. 52404, wherein your present petitioner, Walter Murphy, was plaintiff, and the Capital Traction Co., a corporation, was defendant, and, when so settled, to sign the same as of the 19th day of September, 1912, that being the day when the said bill of exceptions was submitted to the court, the case so described in the said petition to the Court of Appeals of the District of Columbia, being the case to which I have hereinbefore had reference.

The mandamus proceedings wherein I thus sought the aid of the Court of Appeals of the District of Columbia are entitled, "The United States ex relatione Walter Murphy, petitioner, *v.* Ashley M. Gould, an associate justice of the Supreme Court of the District of Columbia, respondent," and the case is entered on the docket of the said court of appeals as No. 393, original.

9. The Court of Appeals of the District of Columbia having in the aforesaid mandamus proceedings issued a rule for Justice Gould to show cause why he should not be required to settle and sign the bill of exceptions submitted to him to be settled and signed as aforesaid, the said justice, in answer to said rule, made response that "the respondent, in addition to the grounds of action specified in respondent's said order of October 16, 1912, above referred to, was largely moved with respect to the making of said order by the fact" that more than 40 days, exclusive of Sundays and legal holidays, had elapsed between the perfecting of plaintiff's appeal and the submission of plaintiff's exceptions to the court and that no order had been made or passed in the cause extending the time for filing the transcript of record in the Court of Appeals of the District, and the respondent, under such a state of fact, concluded that "the settling of any bill of exceptions in said cause would be ineffective and vain."

In other words, the return of Justice Gould to the rule to show cause set up that his action in making the aforesaid order of October 16, 1912, was determined, not solely by rule 48 of the Supreme Court of the District of Columbia (as had appeared to be the case, both from the terms of said order and from the terms of the motion upon which the said order was based), but also by the provision of a rule of the Court of Appeals of the District of Columbia, which reads as follows (Rule 15, par. 1), to wit:

"When an appeal is entered in the court below it shall be the duty of the appellant, within 40 days from the time of the appeal entered and perfected in said court (unless such time for special and sufficient cause be extended by the court below, or a judge thereof, such time to be definite and fixed), to produce and file with the clerk of this court a transcript of the record of such cause; and, if he shall fail to file the transcript within the time limited therefor, the appellee may, after the time limited for filing the transcript in this court by the appellant has expired, and upon his or her default in respect thereto, upon producing a certificate showing the entry of appeal and the date thereof, have said appeal docketed and dismissed."

Respecting this rule of the Court of Appeals of the District of Columbia, referred to by Justice Gould in his return as constituting a factor influencing him in his refusal to settle the bill of exceptions which I had tendered to him for settlement, I am advised by counsel that the record of the cause in the Supreme Court of the District of Columbia, so far as concerns the said rule of the court of appeals, is chiefly embarrassing to me in my appeal, because of an order in the case which Justice Gould himself, on the 16th day of October (an order duly excepted to, and the bill of exceptions ordered on record November 4, 1912), had made antecedently to the order of the same date, which, as hereinbefore mentioned, contained his refusal to settle the exceptions taken at the trial of the cause.

When the counsel by whom I was represented discovered, on September 18, 1912, that the minute entry of the hereinbefore mentioned order of August 19, 1912, which made an extension of time until September 20, 1912, was silent concerning the filing of the transcript of record in the court of appeals and only express concerning the submitting to the court of the bill of exceptions, they at once called the matter to the attention of counsel for the Capital Traction Co., with a view to having the minute entry corrected, the particular counsel on whose oral motion the order had been made being positive in his statements that the motion as made and allowed on the 19th day of August embraced the filing of the transcript in the court of appeals as well as the submission of the bill of exceptions in the lower court; and at the request of counsel representing me, who wished at the earliest moment possible to explain the situation to the court, counsel for the Capital Traction Co. came into court the next day and with my own counsel discussed to the court the two motions that day by me filed in court, one to correct the minute entry of August 19, the other to make an extension of time (further extension) within which to file the transcript of record in the court of appeals. The court did not make its formal order until the following day, September 20, 1912, when it set both the said motions for hearing on October 11, 1912, but the discussion on September 19 showed that the motion to correct would be opposed and that there would probably exist a difference of recollection as to the occurrence of August 19.

When the hearing of the application to correct the minute entry of the order of August 19, 1912, was thus set for a day within the following term of the court, I thought it the part of prudence, acting through and under the advice of counsel, while we were still within the same term of the court at which the order of August 19 had been made, to present, for alternative consideration with the application to correct, a motion for an amendment to be made, nunc pro tunc, to the order of August 19, to the end that, so far as the lower court was concerned, full opportunity should be given to it to exercise whatever of its discretion it might choose to use in the matter of aiding me to an accomplishment of the appeal which I had taken from its judgment of July 2. And when the court on September 30, at the closing of the trial term, and in the act of setting the hearing of this motion also for October 11, 1912, failed and refused to preserve to itself the power, if such motion should be granted, to act at its next term with fullness upon the motion I had made on September 19 for a further extension of time within which to file in the court of appeals the transcript of record for the appeal I had taken from the judgment of July 2, I duly, through counsel, excepted to such omission on the part of the court and had my exceptions recorded in a bill which is part of the record of that court touching the matter of extending time under the rule of the court of appeals aforementioned. And when Justice Gould, before whom for consideration on October 11 came the two motions, the one to correct the minute entry of the order of August 19, the other to amend, nunc pro tunc, the order itself, overruled both the said motions, I duly excepted by counsel and had my exceptions preserved by being put into the record by a bill which shows, among other things, that the judge who passed the order of August 19, the entry of which was thus sought to be corrected, and who also was the judge that overruled the application to correct, stated from the bench that he had no personal or independent recollection of either the order or the motion (which was oral) upon which the order was based; and that the person (one of the assistant clerks) who, during that part of the August recess of the court, made in a memorandum book in the court room the rough notes of proceedings (in all branches of the court as then conducted by one judge), which rough notes, so far as they pertained to proceedings in the circuit-court branch of the court, were afterwards by another person formally written up into the minutes of the court, stated that he had no recollection independently of the rough notes made by himself, and he was an assistant clerk whose duties have been generally performed in connection with business in one of the criminal court and not in one of the circuit court branches of the Supreme Court of the District. And this bill of exceptions, which puts upon record all the evidence before the court when it acted upon the two motions aforesaid, constitutes also part of the record of the Supreme Court of the District touching the matter of extending time under the aforementioned rule of the Court of Appeals of the District of Columbia.

The sum and substance, therefore, of the return made by Justice Gould to the court of appeals in answer to the rule to show cause why he should not be required to settle the bill of exceptions which had been submitted to the court on September 19 and to himself personally on October 1, seems to be that the respondent, having first made an order in which he refused either to correct the minute entry of an order or to amend the order itself, which had extended time, was by the fact that he had made that order "greatly moved to and aided in reaching the conclusion" to make the further order by which he refused to settle the exceptions that were vital to a review of the judgment of July 2 (from which judgment your petitioner was prosecuting an appeal), inasmuch as the said judgment rested for its validity upon a ruling of the said justice which directed the jury to find in favor of the Capital Traction Co. the issue of fact which existed between your petitioner and the said company, to wit, the issue whether the facts and circumstances besetting the accident that befell your petitioner on December 2, 1909, showed a lack of ordinary care in the Capital Traction Co., your petitioner having declared in his suit that the said company was guilty of actionable negligence in the premises.

10. When Justice Gould, on November 11, 1912, filed his aforesaid return to the court of appeals in the mandamus proceedings, the Capital Traction Co. simultaneously filed in that court a motion to docket and dismiss the appeal which had been taken by me from the aforementioned judgment of July 2, 1912, the motion thus made being based upon the rule of the court of appeals hereinbefore quoted, which rule, according to the aforesaid return of Justice Gould, had "greatly aided" the said trial judge "in reaching the conclusion" not to settle the exceptions which had been taken at the trial.

In opposition to the said motion counsel who acted for me filed in the court of appeals an authenticated copy of that part of the record of the cause in the lower court which showed the acts and proceedings had and done in that court in the matter of extending time for filing in the court of appeals the transcript of record for the appeal aforesaid, the two bills which embraced exceptions as hereinbefore mentioned to the orders of September 30 and of October 16, respectively, being included in the copy of the record thus filed in the court of appeals. Among the things shown in the record thus copied, additionally to things already specified, is the fact that one of the counsel for the Capital Traction Co., a few days after my appeal had been perfected, speaking with one of my own counsel (the one who afterwards asked for an extension of time), said that he was then about to leave the city on his summer vacation and did not expect to return before September 15; that he would like to have time to examine the bill of exceptions after his return; that it would be agreeable to him, therefore, if an extension of time should be taken, say, until October 1; and that he would speak with an associate who would be in the city and who would go into court with my counsel at any time for an order of extension.

Counsel representing me thereupon said he would ask for an extension until September 20, which he did, as hereinbefore stated, on August 19. Forty days, the period fixed by the rule of the court of appeals for filing in that court the transcript of record for an appeal, unless an extension of time is made by the lower court, would have expired for my aforesaid appeal September 12.

The motion of the Capital Traction Co. to docket and dismiss the appeal I had taken from the before-mentioned judgment of July 2, made in the Court of Appeals of the District of Columbia on November 11, 1912, as above stated, and the transcript of record from the lower court, filed as aforesaid in opposition to the said motion, were placed upon the general docket of the said court of appeals as cause No. 2478, which cause is entitled "Walter Murphy, appellant, *v.* The Capital Traction Co., appellee."

The double aspect in which my cause thus appeared in the said court of appeals, to wit, cause No. 393 on the original docket of the said court, wherein I was seeking to procure from the judge of the lower court the allowance of a bill of exceptions (without which my appeal from the judgment of the lower court of July 2, 1912, would be valueless), and cause No. 2478 on the general docket of the said court, wherein the Capital Traction Co. was seeking to have my said appeal docketed and dismissed because the lower court had entered no formal order making an extension of time for the filing in the said court of appeals of the transcript of record for the said appeal, came on for consideration, and the two aspects, or the two causes, involving, as I have explained, the fate of my appeal from the judgment of July 2, were viewed together before the said court of appeals, which heard argument on the same on November 21 and 22. And the said court of appeals thereafter, to wit, on the 2d day of December, 1912, filed its opinion and rendered its judgment in the premises.

A copy, properly certified, of the said opinion and judgment, and of all the acts and proceedings of that court in the premises, including a copy of the complete record of that court in both the causes aforesaid, to wit, No. 393 on its original docket and No. 2478 on its general docket, is attached to this petition to be read and referred to as a part of the petition. The petition is also accompanied by a copy of the brief which counsel presented to the said Court of Appeals in my behalf in each of the two cases aforesaid.

11. When the Court of Appeals decided that it would not require Justice Gould to settle the exceptions taken at the trial, which I had tendered to him in a bill to be settled and signed as aforementioned, and decided also that it would grant the motion of the Capital Traction Co. and docket and dismiss my said appeal, I longingly inquired of counsel if they would prosecute my said appeal into your honorable court. But counsel avised me that they were unable on the said appeal to sue out a writ of error to this honorable court; that they would be glad to represent me further, but that the law did not require your honors, at my instance or request, to review the judgment of the Court of Appeals of the District in the matter of my said appeal. Oh, what could I do? Had I lost my appeal without even the poor consolation of a hearing upon its merits? Where could I turn for help? At best I was but a poor newsboy whose savings at the time of the accident complained of had amounted to less than $900, and those savings long since gone by reason of the physical condition that came upon me as the result of the accident—sight gone and body at times so racked with pain that in my agony I cry out and pray to be put out of my misery, and then anesthetics deaden the pain—only a widowed mother and a few other friends, not great or strong, charged with my care and my only dependence. Who could help me?

It was in a negligence case that your great court, speaking of a jury, an integral part of a common-law trial court, used words which ought to be read and pondered by every trial judge when asked to direct a verdict, namely (Railroad Co. *v.* Stout, 17 Wall., 657, 664):

"Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that 12 men know more of the common affairs of life than does 1 man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

When "one man," "a single judge," had assumed to pass upon the facts in my case and direct the conclusion to be therefrom drawn, thereby substituting his own judgment for the "average judgment" of the jury, I had hoped that his judgment thus rendered touching the determination of an issue of fact, would at least be made the subject of judicial review with a view to ascertaining whether it was proper in the particular case for the judge to perform the functions of the jury and render a verdict, which, if correct, is the verdict the jury would itself have rendered if the case had been submitted to them. At least, I am advised by counsel that the theory of a directed verdict is that the verdict which is directed is just what the jury would have found if the matter had been left to the deliberation of the jury. A review of the ruling of the trial judge in my case could not be had without a bill of the exceptions which had been taken at the trial, and it was your great court which said that the settling of a bill of exceptions did not involve any new or substantial right of the opposing party, the words in one of the cases before your honorable court being as follows (Hunnicutt *v.* Peyton, 102 U. S., 333, 353):

"When an exception has been taken at the trial and noted, reducing the exception to form afterwards and attesting it, is not making a new case; it is merely verifying the case as it appeared on the trial."

I am advised by counsel that no substantial right of the Capital Traction Co. required the trial judge, at the time and under the circumstances when the bill containing them was tendered, to refuse to settle the exceptions taken at the trial of my suit against the said company, and I am further advised by counsel that the action of the Court of Appeals of the District in the premises shows that that court sacrificed the substantial legal right of an appellant by a failure to see the difference between form and substance as applicable to the matter in hand. Oh! If your honors please, if the Court of Appeals of the District of Columbia, like Saul of Tarsus, of whom I heard with my mother when she took me a little boy to the Sabbath school to hear the Bible stories there told, thinks itself engaged in a good work, as did Saul when he stood by consenting unto the death of Stephen the martyr, keeping the raiment of them that slew him, can you not cause a light to shine round about and a voice to be heard that shall cause the scales to fall from its eyes that it may see clearly, and then perchance, instead of the Saul who wrought havoc in his blindness, it may be like the Paul, who, after the scales had fallen from his eyes, became the great apostle to the Gentiles, who wrote:

"Whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report, if there be any virtue and if there be any praise, think on these things."

If the legal vision of the Court of Appeals of the District of Columbia causes it to see things with too technical an eye and too little regard for the real merits of the controversies that come before it, can your honors not perceive the effect upon the judges of the lower courts, who, working under its appellate authority, are constrained to see things in the same light, to the obscuration of substance as distinguished from shadow?

I am told that your honors have the power, if you should choose to exercise it, of issuing to the said court of appeals a writ of certiorari, whereby the case I have described could be brought into this honorable court and reviewed, and such action had as the law and justice may require. And I am told that the fact that I am poor and weak and without influential friends will not operate against me in the eyes of your great court, every member of which when he entered upon his high office took an oath that he would "administer justice without respect to persons, and do equal right to the poor and to the rich," and sealed the oath by kissing the Book that was given to man for his guide and inspiration by the Great Judge before whom we must all finally appear and be judged according to that we have done, whether it be good or bad. And I am told, if your honors deny my petition, that there will then have been written on the judicial page the final chapter of the tragedy which destroyed my sight and wrecked my body, and that the cause of action which I had supposed I possessed against the Capital Traction Co. by reason of negligence on its part will then have been closed in the courts, and I denied consideration of the merits of my cause except at the hands of one man, who himself assumed the rôle of both judge and jury.

You have my petition. My appeal is before you. And I will ever pray.

WALTER MURPHY.

JOHN ALTHEUS JOHNSON, *of Counsel.*

(The following pages, written after the court of appeals had filed its opinion in the case, were appended to the foregoing petition when submitted to the Supreme Court of the United States. References to the record herein made are to the printed copies of the certified record which accompanies the petition wherein Walter Murphy lays his case before the Supreme Court of the United States, with a prayer that the latter court take cognizance of his cause and issue a writ of certiorari to the Court of Appeals of the District of Columbia.)

The rule of the Supreme Court of the District of Columbia on the subject of bills of exception provides that the party charged with the preparation of a bill of exceptions shall, at least eight days before submitting it to be settled, have presented a copy of it to opposing counsel. On this feature of the rule the court of appeals in its opinion remarks (p. 24 of the record in No. 393, original):

"His adversary shall have eight days within which to examine the same and express his agreement or his disagreement."

And the court then adds this startling statement:

"In case of agreement, either the justice trying the case or the justice sitting in his stead may sign the same."

This is probably the first time, either in this jurisdiction or any other, that a court of appellate power in common-law causes has ever made the statement that a bill of exceptions, even where the parties were agreed as to its contents, could be signed by any other than the judge to whose rulings the bill was an exception. Signing or attesting is the culminating act which gives to the bill the absolute verity that it has in the eye of the law. And how novel and foreign to all traditions of the law even to suggest that such authentication can be given by a judge who knows nothing whatever of the transactions or rulings referred to in the bill. A few of the States have statutes under which, in the event of the death or permanent disability of the trial judge, the clerk of the court or some other official may certify a bill of exceptions where the parties are agreed concerning it. But give to the rule of the Supreme Court of the District of Columbia the full force and effect of a statute (the effect which is claimed by the court of appeals to be proper for all the rules adopted by both the Supreme Court of the District and by itself) "binding upon the court, upon suitors, and upon those who represent suitors," and still we will examine the terms of the rule in vain for any hint or suggestion of such a thought even as that somebody else than the judge whose ruling is excepted to may sign a bill of exceptions therefor.

For a court of the United States that sits in the District of Columbia it would seem that the case of Malony *v.* Adsit (175 U. S., 281) might be accepted as authority on the question of who must sign a bill of exceptions. In that case counsel for the respective parties had signed a statement that the bill of exceptions was correct and in accordance with the proceedings had in the trial of the cause, and, appending the statement to the bill, had procured the signature of the judge who was then holding the court in which the trial had taken place. The paper so attested was disregarded by the court as not possessing the essential quality of a bill of exceptions.

And still the idea that "the justice sitting in his stead," if the adversary party "expresses his agreement," "may sign the bill of exceptions for the justice who tried the case," is necessary to the view which the Court of Appeals of the District of Columbia took of this case; for, if the justice who presided at the trial be absent and it be necessary to settle the bill (and settling, says the court of appeals, can only be done by the trial judge), then, says the court concerning the bill of exceptions:

"Its presentation to him (that is, to the justice who is sitting in the stead of the absent justice) within the time is all that counsel can do."

In such case, says the court:

"The bill may be submitted to the justice presiding in his stead, and acted upon, as of the date of its submission, by the trial justice upon his return to his court."

The words thus used by the court of appeals, spoken by reason of the facts encountered in this case, themselves show that "submitting the bill to the court within 38 days," or within the time to which the 38 days is extended, and "submitting the bill to the court to be settled" (both of which expressions are used in the rule of court) are different things and may be impossible, in a particular case, of occurring simultaneously, and it is only concerning the latter of these two things that any notice whatever to opposing counsel is prescribed by the rule of the court on the subject of bills of exception.

The chief justice, who wrote the opinion of the court, says (pp. 25–26 of the record in No. 393, original):

"In this case the time fixed for settlement of the bill was before the expiration of the extended time, and, though it is not certain, it may

be assumed that the two days' notice in writing was given. But the petition shows that the bill of exceptions was delivered to opposing counsel but two days before the expiration of the time."

There is nothing in the record (and certainly nothing outside of the record) to warrant either the doubt or the assumption (with the reasoning consequent thereon (with the court, in the words above quoted, expresses concerning the fact of the notice given or concerning the time designated in the notice for the settling of the bill.

The bill of exceptions was not submitted on September 20, two days after the 18th, when a copy of it had been presented to opposing counsel. It was submitted on September 19, with the express statement to the court that it was not then submitted to be settled; that the settlement of it would have to await the return of Justice Gould, who was the only person that could settle and sign it; that proper notice would be given of the time for settling it, but that the plaintiff desired at that time, under the order of August 19, to submit the bill to the court (see p. 2, also p. 6, of the record in No. 393, original; and p. 16, also pp. 18–19, of the record in No. 2478). And notice of the time for settling was given, not on September 19, but on September 26, and it was given for October 1, the earliest day at which Justice Gould would be available (see p. 3 of the record in No. 393, original; and pp. 19–20 of the record in No. 2478).

If a copy of the bill had been placed in the hands of opposing counsel eight days, instead of one, before September 19, and if the two days' notice had been given for September 19 as the time when the bill would be "submitted to the court to be settled," what would the procedure have amounted to more than the thing that was actually done? It would have been a vain procedure—known to be vain, unless the revolutionary statement, adverted to above, be accepted as correct law, announced for the first time in this case.

The right of appeal, when given by the law, is a right so valuable that the courts in guarding it have almost universally held that the proper course in cases at law is to award a new trial if, by reason of the death or confirmed illness of the trial judge, there is no one who can sign the bill of exceptions requisite to the appeal. For instance, in Henrichsen *v.* Smith (29 Oreg., 475) the trial judge had extended into the next succeeding term of the court the time within which the appellant could prepare and present his bill of exceptions. Within the time prescribed, but at the succeeding term of the court, the appellant presented his bill, but the trial judge had died and his successor, who was on the bench, set aside the judgment and granted a new trial, because otherwise the appellant, without a bill of exceptions, would have lost his appeal. And, though the owner of the judgment questioned the authority of the court at a subsequent term to set aside the judgment, the supreme court of the State approved what had been done. In like manner, in Crittenden *v.* Schermerhorn (35 Mich., 370) the trial judge, after his retirement from office, had by stipulation of the parties, signed the bill of exceptions. But the defendant in error raised the objection in the supreme court of the State that a stipulation of the parties could not confer authority to sign a bill of exceptions. Says the court (p. 370):

"The point is well taken. But it does not follow that the judgment should be affirmed. On the contrary, where a party has lost the benefit of his exceptions from causes beyond his control, it is proper to give him a new trial; and this we have done in some cases where the judge's term of office expired before exceptions could be settled. The judgment will therefore be reversed and a new trial ordered."

But in the District of Columbia, so technical in matters of mere procedure is the judicial mind becoming, working under the supervision and direction of the Court of Appeals of the District, that the question with the trial judge, concerning the bill of exceptions in the present case, seems to have been to act, not with a view to aiding the appeal, but to defeating it; and when he was cited to explain the reasons for his action, seeming doubtful of the propriety of his acts under the rule of his own court, he pointed to a rule of the Court of Appeals of the District and said that rule also had influenced him, a rule which prescribed the time within which an appellant must file in the Court of Appeals the transcript of record for his appeal, which time, by the rule referred to, is fixed, even in common law causes, with reference to the perfecting of the appeal and not with reference to the signing or certifying of bills of exception; and though the plaintiff, in the effort to prosecute his appeal, had kept that rule in mind also, both rules were put into action on his appeal in a decision by the Court of Appeals, under which, if that court had only before have gone the length it now has gone, there would have been no necessity or occasion for the trial judge to consider or be influenced by any other than the rule of his own court.

If there be an express order of the court allowing time "to and including the 20th day of September" within which "to submit to the court the bill of exceptions taken at the trial of this cause," and if the bill of exceptions is submitted to the court on September 19; and if there be the further facts that on Sepember 26 notice is given to opposing counsel, in whose hands a copy of the bill thus submitted had been placed on September 18, that the court would be asked to settle and sign the said bill on October 1, the earliest available day, by reason of absence from the city, on which the matter could be submitted to the judge who must settle and sign; and if that notice be gratified by actually placing the bill on October 1 before the judge with the request that he settle and sign; and if, by reason of the trial judge's absence from the city, a two-day extension of the trial term of the court had been asked for and obtained, so as to cause the trial term to embrace October 2; and if the court, whose judgment in most cases is a finality in the District of Columbia, should declare, in the face of such facts, that it was proper to refuse settlement and allowance of the bill of exceptions so submitted, on the sole ground that a copy of the bill had not been presented to opposing counsel at least eight days before September 20, and should base such declaration on the theory (a mere legal mirage) that some other than the trial judge might on September 20 have been able to sign the bill, would such action on the part of the court not indicate a morbid condition of inability to note the difference between matters which are of mere procedure only and matters which are of substantive right; such a condition as is likely, if not checked, soon to obliterate, within the jurisdiction of the court's authority, all differences between justice and flimsily spun legal technicalities, in the name of which justice is so often sacrificed in the courts?

Such facts, followed by such a judgment, are recited in the petition of Walter Murphy and shown in the judicial records upon which his petition is based. That the court, which in most cases is the court of last resort in the District of Columbia, should adjudge such a conclusion from the facts stated would seem to denote a condition which needs a remedy, such a remedy as the Supreme Court of the United States is competent to apply, if only it shall be pleased to do so.

JOHN ALTHEUS JOHNSON.

AMENDMENTS TO APPROPRIATION BILLS.

Mr. LODGE submitted an amendment providing that all officers of the Navy or Marine Corps shall be credited with the actual time they may have served as officers, enlisted men, paymaster clerks, or clerks of commandants in the Regular or Volunteer Army or Navy, etc., intended to be proposed by him to the naval appropriation bill, which was referred to the Committee on Naval Affairs and ordered to be printed.

Mr. SUTHERLAND submitted an amendment providing that in the event of reductions being made in any force employed under the civil service or in any of the executive departments no honorably discharged soldier, sailor, or marine whose record is rated good shall be discharged or dropped or reduced in rank or salary, etc., intended to be proposed by him to the legislative appropriation bill, which was referred to the Committee on Appropriations and ordered to be printed.

Mr. CURTIS submitted an amendment proposing to appropriate $5,000 for aid and support of the National Library for the Blind, intended to be proposed by him to the District of Columbia appropriation bill, which was referred to the Committee on Appropriations and ordered to be printed.

FUNERAL EXPENSES OF THE LATE SENATOR DAVIS.

Mr. BRISTOW submitted the following resolution (S. Res. 425), which was read and referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

Resolved, That the Secretary of the Senate be, and he is hereby, authorized and directed to pay from the miscellaneous items of the contingent fund of the Senate the actual and necessary expenses incurred by the committee appointed by the President of the Senate pro tempore in arranging for and attending the funeral of the late Senator JEFF DAVIS from the State of Arkansas, vouchers for the same to be approved by the Committee to Audit and Control the Contingent Expenses of the Senate.

IMPRISONMENTS IN THE ARMY AND NAVY.

Mr. WORKS submitted the following resolution (S. Res. 424), which was read, considered by unanimous consent, and agreed to:

Resolved, That the Secretaries of War and of the Navy be, and they are each, instructed to furnish to the Senate the following information:

1. The number of persons serving in the Army and Navy, respectively, imprisoned during the year 1912, for which offenses, and the term of imprisonment imposed in each case, and the prison or other place of such imprisonment, and the nature and kind of prisons in which incarcerated.

2. The number of such persons, so serving the Government, now serving prison sentences, and for what offense in each case, and the term of imprisonment imposed, for what offenses, and where imprisoned.

PROTECTION OF BIRDS.

Mr. McLEAN. I desire to give notice that on Tuesday, January 14, at the close of the morning business, I will address the Senate on the bill (S. 6497) to protect migratory game and insectivorous birds in the United States.

OMNIBUS CLAIMS BILL.

Mr. CRAWFORD. I move the Senate resume the consideration of House bill 19115, known as the omnibus claims bill.

There being no objection, the Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 19115) making appropriation for payment of certain claims in accordance with findings of the Court of Claims, reported under the provisions of the acts approved March 3, 1883, and March 3, 1887, and commonly known as the Bowman and the Tucker Acts.

Mr. CULLOM. A day or two ago I attempted to introduce an amendment to be referred to the Committee on Claims, and I think it was lost in the shuffle. I do not know whether it was incorporated in the bill or not.

The PRESIDENT pro tempore. The amendment, the Chair is informed, is upon the clerk's desk.

Mr. CULLOM. I ask leave now to offer it.

The PRESIDENT pro tempore. As an amendment to the bill?

Mr. CULLOM. As an amendment to the bill under consideration.

Mr. CRAWFORD. What is the character of the amendment?

Mr. CULLOM. It is a longevity claim.

Mr. CRAWFORD. Is the report of the Court of Claims attached to it?

Mr. CULLOM. Yes.

Mr. CRAWFORD. So that it is the same as the other longevity cases?

Mr. CULLOM. It is exactly the same, as I understand it.

The PRESIDENT pro tempore. The Senator from Illinois asks unanimous consent that the amendment offered by him may be considered, there being a pending amendment which

would otherwise be in order. The Chair hears no objection, and the amendment will now be considered. It will be read.

The SECRETARY. On page 263 of the bill, after line 9, insert:

To Phil Mitchell, administrator de bonis non cum testamento annexo of the estate of William Hoffman, deceased, of Rock Island, Ill., $2,206.30.

The PRESIDENT pro tempore. The question is on the adoption of the amendment.

Mr. CRAWFORD. I understand from the Senator from Illinois that there accompanies this claim the report from the Court of Claims adjudicating it, and that it is in exactly the same class with similar amendments which the committee has accepted. With that understanding, I make no objection to it, but I ask that the report of the Court of Claims be printed in the proceedings so that we may examine it afterwards, and I reserve the right, if I find any good reason therefor, to ask for a reconsideration.

The PRESIDENT pro tempore. The report is not upon the desk.

Mr. CULLOM. It was attached to the amendment that I offered.

The PRESIDENT pro tempore. It will be procured and printed as requested. Without objection, the amendment is agreed to. The findings of the court will be printed in the RECORD.

The matter referred to is as follows:

[Senate Document No. 977, Sixty-second Congress, third session.]

PHIL MITCHELL, ADMINISTRATOR OF THE ESTATE OF WILLIAM HOFFMAN, DECEASED.

Letter from the assistant clerk of the Court of Claims transmitting a copy of the findings of the court in the case of Phil Mitchell, administrator of the estate of William Hoffman, deceased, against The United States.

COURT OF CLAIMS, CLERK'S OFFICE,
Washington, December 3, 1912.

Hon. AUGUSTUS O. BACON,
President pro tempore of the Senate.

SIR: Pursuant to the order of the court, I transmit herewith a certified copy of the findings of fact and conclusion filed by the court in the aforesaid cause, which case was referred to this court by resolution of the United States Senate under the act of March 3, 1887, known as the Tucker Act.

I am, very respectfully, yours, JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Court of Claims. Congressional, No. 14978–6. Phil Mitchell, administrator de bonis non cum testamento annexo of the estate of William Hoffman, deceased, *v.* The United States.

STATEMENT OF CASE.

This is a claim for longevity pay alleged to be due on account of the service of William Hoffman, late an officer in the United States Army. On the 21st day of June, 1910, the United States Senate referred to the court a bill in the following words:

"[S. 8238, Sixty-first Congress, second session.]

"A bill for the relief of Henry Prince and certain other Army officers and their heirs or legal representatives.

"*Be it enacted, etc.*, That the Secretary of the Treasury be, and he is hereby, authorized and directed to settle, adjust, and pay, out of any money in the Treasury not otherwise appropriated, the claims of * * * William Hoffman * * * officers of the Army of the United States, or their heirs or legal representatives where dead, for longevity pay, according to the decisions of the Supreme Court of the United States in the cases of The United States *v.* Tyler (105 U. S., 244), The United States *v.* Morton (112 U. S., 1), and The United States *v.* Watson (130 U. S., 80)."

Isabella Kobbe appeared in this court October 31, 1910, and filed her petition, in which it is substantially averred that:

She is the daughter and sole heir at law of William Hoffman, deceased, who entered military service of the United States as a cadet at the Military Academy July 1, 1825, and served continuously until the date of his death, August 12, 1884; that longevity pay computed on a basis that his service began on entering said Military Academy was never paid said officer or this claimant; and that additional longevity pay should be paid the claimant reckoned on a basis that his service began on entering said Military Academy, in accordance with the decisions of the Supreme Court of the United States in the cases of Tyler *v.* The United States (105 U. S., 244), of Morton *v.* The United States (112 U. S., 1), and of The United States *v.* Watson (130 U. S., 80); that a claim for all pay and allowances was filed with the Auditor for the War Department and disallowed by that officer; and the claimant claimed $2,451.65.

Phil Mitchell, administrator de bonis non cum testamento annexo of the estate of William Hoffman, deceased, was substituted as claimant by order of court October 17, 1912, upon his filing a certificate showing his appointment and qualification as such administrator.

The case was brought to a hearing on its merits on the — day of October, 1912. Frederick A. Fenning, Esq., appeared for the claimant, and the Attorney General, by George M. Anderson, Esq., his assistant and under his direction, appeared for the defense and protection of the interests of the United States.

The court, upon the evidence and after considering the briefs and arguments of counsel on both sides, makes the following

FINDINGS OF FACT.

I. The claimant, Phil Mitchell, is the duly appointed administrator de bonis non of the estate of William Hoffman, deceased, and is a citizen of the United States, residing at Rock Island, in the State of Illinois.

II. Said William Hoffman during his lifetime was an officer in the United States Army, having entered the Military Academy as a cadet on July 1, 1825. He graduated therefrom and was appointed second lieutenant July 1, 1829; promoted to be first lieutenant November 16, 1836; captain February 1, 1838; major April 15, 1851; lieutenant colonel October 17, 1860; colonel April 25, 1862; and was retired as such May 1, 1870, and died August 12, 1884.

III. Said decedent was paid his first longevity ration from July 5, 1838; second from July 1, 1839; third from July 1, 1844; fourth from July 1, 1849; fifth from July 1, 1854; sixth from July 1, 1856; seventh from July 1, 1864; and eighth from July 1, 1869.

Under the decisions of the United States Supreme Court in the case of United States *v.* Watson (130 U. S., 80), claimant would be entitled to additional allowances on account of the service of said decedent amounting to $2,220.25, as reported by the Auditor for the War Department, from which would be deducted overpayments amounting to $13.95, leaving a balance of $2,206.30.

IV. A claim for longevity increase under the act of July 5, 1838 (5 Stats., 256), on account of decedent's service was presented to the accounting officers of the Treasury and was disallowed by them November 29, 1890, for the reason that service as a cadet could not be counted in computing longevity pay and allowances for services prior to February 24, 1881, which disallowance was in accordance with the decisions of the accounting officers in force at the time. Except as above stated, the claim was never presented to any department or officer of the Government prior to its presentation to Congress and reference to this court as hereinbefore set forth in the statement of the case, and no evidence is adduced to show why the claim was not earlier prosecuted.

CONCLUSION.

Upon the foregoing findings of fact the court concludes that the claim herein not having been filed for prosecution before any court within six years from the time it accrued is barred.

The claim is an equitable one against the United States in so far as they received the benefit of the services of said decedent while a cadet at the Military Academy, which service the Supreme Court in the case of The United States *v.* Watson (130 U. S., 80), decided to be service in the Army.

BY THE COURT.

Filed November 18, 1912.
A true copy.
Test this 22d day of November, 1912.
[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Mr. GALLINGER. I will ask the Senator from South Dakota to kindly permit me to offer an amendment which calls for only $163.69, for overdue work in the Washington Navy Yard. It is the case of a poor man, and the findings are here.

Mr. CRAWFORD. Will the Senator just let me glance at the report of the court?

Mr. GALLINGER. Certainly.

Mr. CRAWFORD (after a pause). There is no objection to it. It is regular.

Mr. GALLINGER. I offer the following amendment and submit the findings of fact, which I ask be printed in connection with it.

The PRESIDENT pro tempore. There being pending an amendment, the amendment is now offered by unanimous consent. It will be read.

The SECRETARY. After line 12, page 153, of the bill, insert:

Richard Allen, $163.69.

The amendment was agreed to.

The PRESIDING OFFICER (Mr. HITCHCOCK in the chair). The findings of the court will be printed in the RECORD.

The matter referred to is as follows:

[Senate Document No. 849, Sixty-second Congress, second session.]

RICHARD ALLEN.

Letter from the assistant clerk of the Court of Claims transmitting a copy of the findings of the court in the case of Richard Allen *v.* The United States.

COURT OF CLAIMS, CLERK'S OFFICE,
Washington, June 14, 1912.

Hon. JAMES S. SHERMAN,
President of the Senate.

SIR: Pursuant to the order of the court, I transmit herewith a certified copy of the findings of fact and conclusion filed by the court in the aforesaid cause, which case was referred to this court by resolution of the United States Senate under the act of March 3, 1887, known as the Tucker Act.

I am, very respectfully, yours, JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Court of Claims of the United States. Congressional, No. 13727–3. Richard Allen *v.* The United States.

The claim herein is for services rendered by claimant at the Washington Navy Yard between March 21, 1878, and September 22, 1882, for extra labor above the legal day of eight hours.

On the 19th day of February, 1908, the United States Senate by resolution referred to the court Senate bill No. 5528, which is in the following words:

"A bill for the relief of Joseph M. Padgett and others.

"*Be it enacted, etc.*, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to Joseph M. Padgett and to the others who have joined with him in a petition to this Congress, dated February 17, 1908, the amounts that may be found due to each of them, respectively, for extra labor above the legal day of eight hours, while employed by the United States as workmen, laborers, or mechanics at the various navy yards of the United States, performed by them by reason and under the provisions of circular No. 8, issued by the Secretary of the Navy on March 21, 1878."

Thereafter the claimant above named appeared and filed his petition in this court, in which he avers substantially as follows:

That between March 21, 1878, and September 21, 1882, he was employed by the Government of the United States at the navy yard at Washington, D. C.; that on March 21, 1878, the Secretary of the Navy issued the order referred to in claimant's petition, known as circular No. 8 and hereinafter set forth in Finding I.

That during the six months in each year from the date of said order to the 21st of September, 1882, he worked during all or a portion of the time he was so employed during said period, and that he is entitled to the value of the time worked in excess of 8 hours a day.

The case was brought to a hearing on the evidence and merits on the 28th day of May, 1912.

Messrs. Brandenburg & Brandenburg and Clarence W. De Knight appeared for the claimant, and the Attorney General, by Percy M. Cox, Esq., his assistant and under his direction, appeared for the defense and protection of the interests of the United States.

The court, upon the evidence and after considering briefs and arguments of counsel on both sides, makes the following

FINDINGS OF FACT.

I. Between March 21, 1878, and September 22, 1882, the claimant herein was in the employ of the United States in the navy yard at Washington, D. C., during which time the following order was in force:

Circular No. 8.] NAVY DEPARTMENT,
Washington, D. C., March 21, 1878.

The following is hereby substituted to take effect from this date, for the circular of October 25, 1877, in relation to the working hours at the several navy yards and shore stations:

The working hours will be, from March 21 to September 21, from 7 a. m. to 6 p. m.; from September 22 to March 20, from 7.40 a. m. to 4.30 p. m., with the usual intermission of one hour for dinner.

The department will contract for the labor of mechanics, foremen, leading men, and laborers on the basis of 8 hours a day. All workmen electing to labor 10 hours a day will receive a proportionate increase of their wages.

The commandants will notify the men employed or to be employed of these conditions, and they are at liberty to continue or accept employment under them or not.

R. W. THOMPSON,
Secretary of the Navy.

II. Said claimant, while in the employ of the United States as aforesaid, worked on the average in excess of 8 hours a day as follows: 488½ hours, at $2.50 per day, and 39§ hours, at $2.25 per day.

III. If it is considered that 8 hours constituted a day's work during the period from March 21, 1878, to September 22, 1882, under said Circular No. 8, then the claimant has been underpaid $163.69.

IV. The claim herein was never presented to any department or officer of the Government prior to the presentation thereof to Congress and reference to this court as hereinbefore set forth, and no evidence is adduced to show why claimant did not earlier prosecute his said claim.

CONCLUSION.

Upon the foregoing findings of fact the court concludes that the claim herein is not a legal one against the United States and is equitable only in the sense that the Government received the benefit of the services of said claimant in excess of 8 hours a day as above set forth.

BY THE COURT.

Filed June 3, 1912.
A true copy.
Test this 13th day of June, 1912.
[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Mr. CRAWFORD. I understand the Senator from Massachusetts [Mr. LODGE] desires to address the Senate further in relation to the pending amendment, which seeks to incorporate the French spoliation claims into the bill.

Mr. LODGE. Mr. President——

Mr. STONE. Before the Senator from Massachusetts begins his speech, I should like to offer an amendment. I desire to offer an amendment to the bill, to have added the claim of Harry Troll, administrator of the estate of Justis McKinstry, deceased. It is a longevity claim of exactly the same nature as others which have been embodied in the bill.

Mr. CRAWFORD. Is there accompanying that a report from the Court of Claims?

Mr. STONE. Fully; yes.

Mr. CRAWFORD. Then, Mr. President, there is no objection. I make the same statement in regard to it as to others, and I ask that the report be printed in the RECORD so that we may have an opportunity to examine it.

Mr. STONE. Very well.

The PRESIDING OFFICER. The amendment proposed by the Senator from Missouri [Mr. STONE] will be stated.

The SECRETARY. On page 264, after line 22, under the head of "Missouri," it is proposed to insert the following:

To Harry Troll, of St. Louis, administrator of the estate of Justis McKinstry, deceased, $1,939.11.

The amendment was agreed to.

The PRESIDING OFFICER. The findings of the Court of Claims will be printed in the RECORD.

The findings referred to are as follows:

COURT OF CLAIMS, CLERK'S OFFICE,
Washington, December 7, 1912.

Hon. AUGUSTUS O. BACON,
President pro tempore of the Senate.

SIR: Pursuant to the order of the court, I transmit herewith a certified copy of the findings of fact and conclusion filed by the court in the aforesaid cause, which case was referred to this court by resolution of the United States Senate under the act of March 3, 1887, known as the Tucker Act.

I am, very respectfully, yours,

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Court of Claims. Congressional, 15389, Sub. 4. Harry Troll, administrator of the estate of Justus McKinstry, v. The United States.

STATEMENT OF THE CASE.

On the 21st day of February, 1911, Senate bill 10806, Sixty-first Congress, third session, for the relief of Justus McKinstry, or his heirs or legal representatives, where dead, for longevity pay, was referred to this court by a resolution of the United States Senate for findings of fact under the terms of section 14 of the act approved March 3, 1887.

Said bill reads as follows:

"A bill for the relief of Christopher H. McNally and certain other Army officers and their heirs or legal representatives.

"*Be it enacted, etc.*, That the Secretary of the Treasury be, and he is hereby, authorized and directed to settle, adjust, and pay, out of any money in the Treasury not otherwise appropriated, the claims of Christopher H. McNally, William C. Forbush, John Nichols Coe, Alexander Logan Morton, Justus McKinstry, Arthur Hubert Burnham, Edward McK. Hudson, Joseph Hale, Wentz Curtis Miller, Redmond Tully, Augustus G. Tassin, and Edward Maxwell Wright, officers of the Army of the United States, or their heirs or legal representatives where dead, for longevity pay, according to section 15 of the act of July 5, 1838 (5 Stat. L., p. 258), and acts amendatory thereof, and the decisions of the Supreme Court of the United States in the cases of the United States against Tyler (105 U. S., p. 244), the United States against Morton (112 U. S., p. 1), and the United States against Watson (130 U. S., p. 80)."

That Harry Troll is the administrator of the estate of Justus McKinstry, late of St. Louis, State of Missouri, and that he is a citizen of the United States and a resident of the city of St. Louis, in the State of Missouri.

That Justus McKinstry served in the United States Army as follows:

"Cadet, M. A., July 1, 1833; second lieutenant, Second Infantry, July 1, 1838; first lieutenant, April 18, 1841; captain, January 12, 1848; captain acting quartermaster, March 3, 1847; major and quartermaster, August 3, 1861; brigadier general of Volunteers, September 2, 1861, which expired July 17, 1862; dismissed January 28, 1863; died December 11, 1897."

and by reason of such service is entitled to longevity pay, computing the time he served at the Military Academy as a cadet, in accordance with the decisions of the Supreme Court of the United States as laid down in the case of the United States *v.* Watson (130 U. S. Rep., p. 80) and United States *v.* Tyler (105 U. S. Rep., p. 244), which has never been paid to the deceased officer or his heirs.

That application for such longevity increase pay was made to the accounting officers of the Treasury Department, but said claim was disallowed on the 8th day of January, 1891, on the ground "Service as a cadet under the existing laws and decisions can not be counted in computing longevity pay and allowances for services prior to February 24, 1881," contrary to the decisions of the Supreme Court of the United States in the cases of Watson and Tyler, above stated.

Application was again made for same longevity increase pay in accordance with the decision of the Comptroller of the Treasury in the case of Alexander O. Brodie (14 Comp. Dec., p. 795), but this application was disallowed in May, 1909, on the ground that there was no authority of law to reopen an adverse settlement made by a predecessor, irrespective of the fact that the law now favors the settlement of this class of cases.

That there is due the claimant under the law as decided by the Supreme Court of the United States in the case of United States *v.* Watson and Tyler, above stated, the following amount of longevity increase pay:

First longevity ration from July 5, 1838, to June 30, 1843	$364.40
Second longevity ration from July 5, 1843, to June 30, 1848	365.40
Third longevity ration from July 5, 1848, to June 30, 1853	365.20
Fourth longevity ration from July 5, 1853, to June 30, 1858	438.20
Fifth longevity ration from July 5, 1858, to June 30, 1863	407.30
Total	1,940.50
Less tax	1.39
Balance	1,941.11

That the deceased, Justus McKinstry, was loyal to the United States throughout the War of the Rebellion, he having served during said rebellion until the 28th day of January, 1863, when his service from the Army of the United States was severed.

The case was brought to a hearing on loyalty and merits on the 23d day of October, 1912.

Lyon & Lyon appeared for the claimant, and the Attorney General, by George M. Anderson, Esq., his assistant, and under his direction, appeared for the defense and protection of the interest of the United States.

The court, upon the evidence and after considering the briefs and arguments of counsel upon both sides, makes the following

FINDINGS OF FACT.

I. Claimant's decedent, Justus McKinstry, was an officer in the United States Army, having entered the United States Military Academy as a cadet on July 1, 1833. He graduated therefrom and was appointed second lieutenant, Second United States Infantry, July 1, 1838; promoted first lieutenant April 18, 1841; captain and acting quartermaster March 3, 1847; major and quartermaster August 3, 1861; appointed brigadier general of Volunteers September 6, 1861, and served as such to July 17, 1862. He was dismissed January 28, 1863.

II. Said decedent was paid his first longevity ration from July 1, 1843, and one additional ration for each five years subsequent thereto. Under the Watson decision he would be entitled to additional allowances amounting to $1,939.11, as reported by the Auditor for the War Department.

III. The claim herein was presented to the accounting officers of the Treasury and the same was disallowed January 8, 1891, and again in 1910.

Except as above stated, the claim has never been presented to any department or officer of the Government prior to its presentation to Congress and reference to this court as aforesaid.

CONCLUSION.

Upon the foregoing findings of fact the court concludes that the claim herein, not having been filed for prosecution before any court within six years from the time it accrued, is barred.

The claim is an equitable one against the United States, in so far as they received the benefit of the service of said decedent while a cadet at the Military Academy, which service the Supreme Court, in the case of the United States *v.* Watson (130 U. S., 80), decided was service in the Army.

BY THE COURT.

Filed November 11, 1912.
True copy.
Attest this 30th day of November, 1912.
[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Mr. LODGE. Mr. President, I ask, first, for the adoption of an amendment in a case of longevity pay, the same as those amendments that have already, I think, been adopted.

Mr. CRAWFORD. Is there a report accompanying it?

Mr. LODGE. There is a report accompanying it, and the findings of fact may be read, if the Senator desires, or placed in the RECORD.

Mr. CRAWFORD. I will not ask that they be read, but I ask that they be printed in the RECORD in connection with the amendment, so that we may examine them.

Mr. LODGE. This is precisely the same as all other longevity cases.

The PRESIDING OFFICER. The Senator from Massachusetts offers an amendment, which will be stated.

The SECRETARY. On page 241, after line 12, it is proposed to insert:

To Katharine B. Thomson, administratrix de bonis non cum testamento annexo of the estate of Francis Beach, deceased, of Plymouth, Mass., $1,612.33.

The amendment was agreed to.

The PRESIDING OFFICER. The findings of the Court of Claims in relation to the case will be printed in the RECORD.

The findings referred to are as follows:

COURT OF CLAIMS, CLERK'S OFFICE,
Washington, December 3, 1912.

Hon. AUGUSTUS O. BACON,
President pro tempore of the Senate.

SIR: Pursuant to the order of the court, I transmit herewith a certified copy of the findings of fact and conclusion filed by the court in the aforesaid cause, which case was referred to this court by resolution of the United States Senate under the act of March 3, 1887, known as the Tucker Act.

I am, very respectfully, yours, JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Court of Claims. Congressional, No. 14199. Katharine B. Thomson, administratrix de bonis non cum testamento annexo of the estate of Francis Beach, deceased, *v.* The United States.

STATEMENT OF CASE.

This is a claim for longevity pay alleged to be due on account of the service of Francis Beach, late an officer in the United States Army. On the 3d day of March, 1909, the United States Senate referred to the court a bill in the following words:

"[S. 9529, Sixtieth Congress, second session.]

"A bill for the relief of Francis Beach and certain other Army officers and their heirs or legal representatives.

"*Be it enacted, etc.*, That the Secretary of the Treasury be, and he is hereby, authorized and directed to settle, adjust, and pay, out of any money in the Treasury not otherwise appropriated, the claims of Francis Beach * * * officers of the Army of the United States, or their heirs or legal representatives where dead, for longevity pay according to the decisions of the Supreme Court of the United States in the cases of The United States *v.* Tyler (105 U. S., 244), The United States *v.* Morton (112 U. S., 1), and The United States *v.* Watson (130 U. S., 80)."

Katharine B. Thomson appeared in this court December 1, 1910, and filed her petition, in which it is substantially avered that she is the daughter and heir at law of Francis Beach, who entered the military service of the United States as a cadet at the Military Academy July 1, 1853, and served continuously until the date of his death, February 5, 1873; that longevity pay computed on a basis that his service began on entering said Military Academy was never paid said officer or the claimant, and that additional longevity pay should be paid the claimant reckoned on a basis that his service began on entering said Military Academy, in accordance with the decisions of the United States Supreme Court in the cases of Tyler *v.* The United States (105 U. S., 244), of Morton *v.* The United States (112 U. S., 1), and of The United States *v.* Watson (130 U. S., 80); that a claim for all pay and allowances due was filed with the Auditor for the War Department and disallowed by that officer, and the claimant claimed $2,113.60.

By order of court of October 17, 1912, Katharine B. Thomson, administratrix de bonis non cum testamento annexo of the estate of Francis Beach, was substituted as claimant upon her filing a certificate showing her appointment and qualification as such administratrix.

The case was brought to a hearing on its merits on the 21st day of October, 1912. Messrs. Coldren & Fenning appeared for the claimant, and the Attorney General, by George M. Anderson, Esq., his assistant and under his direction, appeared for the defense and protection of the interests of the United States.

The court, upon the evidence and after considering the briefs and arguments of counsel on both sides, makes the following

FINDINGS OF FACT.

I. The claimant, Katharine B. Thomson, is a citizen of the United States, residing at Plymouth, Mass., and is the duly appointed administratrix of the estate of Francis Beach, deceased.

II. Said Francis Beach entered the United States military service as a cadet at the Military Academy July 1, 1853. He graduated therefrom and was appointed second lieutenant July 1, 1857; promoted to first lieutenant April 29, 1861; captain August 14, 1862, and died February 5, 1873. He was paid his first longevity ration from July 1, 1862, and one additional ration for each five years subsequent thereto.

III. Under the decision of the Supreme Court in the case of United States *v.* Watson (130 U. S., 80), claimant is entitled to additional longevity allowances amounting to $1,675, as reported by the Auditor for the War Department, from which should be deducted $63.45 due the United States on account of overpayments to said decedent, leaving a balance due of $1,612.33.

IV. A claim for longevity increase on account of cadet service of said decedent was presented to the accounting officers of the Treasury and was disallowed by them November 12, 1890, for the reason that as said decedent was not in the service after February 24, 1881, service as a cadet could not be counted in computing longevity pay under existing laws and decisions.

Except as above stated the claim was never presented to any department or officer of the Government prior to its presentation to Congress and reference to this court, as hereinbefore set forth in the statement of the case, and no evidence is adduced to show why claimant did not earlier presnt her said claim.

CONCLUSION.

Upon the foregoing findings of fact the court concludes that the claim herein, not having been filed for prosecution before any court within six years from the time it accrued, is barred.

The claim is an equitable one against the United States in so far as they received the benefit of the service of said decedent while a cadet at the Military Academy, which service the Supreme Court in the case of United States *v.* Watson (130 U. S., 80) decided was service in the Army.

BY THE COURT.

Filed November 11, 1912.
A true copy.
Test this 22d day of November, 1912.
[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Mr. LODGE. Mr. President, before going on with a discussion of the amendment offered by the Senator from South Dakota [Mr. CRAWFORD] to my amendment, I desire to place in the RECORD, and call the attention of the Senator from South Dakota to it, a statement which I received in regard to another case which was voted on here and rejected by a vote of the Senate. I do this only in justice to the people involved. It is the Flower claim for the destruction of property in Virginia by forces of the United States during the Civil War. The Senator from South Dakota will probably recall the case, as we had some considerable discussion about it. Objection was then made, among other objections, that the owner of the property in whose name the claim was made by his heirs had never himself made the claim, and various other points were raised against the claim. In justice to the people who make the claim, I wish to call attention to some of the facts contained in the letter which I hold in my hand, which I will then ask to have printed in the RECORD. The writer is the son of the owner of the property. He says:

My father, Thomas Brinton Flower, was a clergyman of the Episcopal Church, and had charge of the Church of the Messiah at Woods Hole, Mass., for nine years previous to the opening of the war. In September, 1861, he removed with his family to Ashfield, in this county, where he died in June, 1862, nearly three years previous to the damage to his property in Virginia. A very conclusive reason, it seems to me, why he never himself laid claim for any damage.

He then goes on and gives an account of the whole thing. I think, in justice to the claimants, that the letter ought to be printed. It simply shows, in my opinion, that they were entitled to the claim. I ask the Senator from South Dakota to read the letter as it will appear in the RECORD. I will not detain the Senate to read it all, but it explains about the laches and gives the full details. I ask that the letter may be printed in the RECORD.

Mr. CRAWFORD. Mr. President, I simply want to say upon that point that the report of the committee is based entirely upon the result of an examination of the findings returned by the Court of Claims and the opinion given by the Court of Claims. The committee can not, and no Committee on Claims could, go outside of the findings returned by the Court of Claims and examine into matters beyond the record. To do so would be an utter physical impossibility. The Court of Claims was created to do that work for us, to make these findings and these conclusions for our guidance. If we were to go into that sort of investigation of this claim to which the Senator from Massachusetts calls attention, I dare say there are 1,500 other claims which it could be urged from one cause or another would justify an examination outside of the findings of the Court of Claims. My request is that we allow all matters of that kind to go to conference, and if the conferees feel in any particular case that a claim is unusual and that it demands some exception, they can give it that attention; but, as I have said, it is utterly impossible for the Senate to undertake to deal with such cases.

Mr. LODGE. I think the Senator from South Dakota misunderstood me. I did not mean to reopen the case or to move to reconsider the vote of the Senate, but the Senator heretofore, when debating the case, said the man who owned the property never made any claim. Well, the man who owned the property died three years before the damage occurred, and therefore could hardly have made the claim. I merely, as that was going outside of the record, sought only, in justice to the people who made the claim, to show that in that respect, at least, they were not to blame, and also to give a full account of the transaction. I do not suppose the claim will be in conference, as I do not understand it is embraced in the House bill.

Mr. CRAWFORD. Then, it is not in the House bill?

Mr. LODGE. No.

Mr. CRAWFORD. That will make it all the more impossible for us to act on it here, because, if we could put it in the bill, the House having never acted upon it, at this stage of the proceedings, with this session coming to an end on the 4th of

March, it would be utterly impossible, I would say to the Senator, for it to receive favorable consideration.

Mr. LODGE. I understand that. I told the Senator I did not expect it would be possible to reverse the action of the Senate.

The PRESIDING OFFICER. Does the Senator from South Dakota object to the publication in the RECORD of the letter?

Mr. CRAWFORD. Oh, no; certainly not.

The PRESIDING OFFICER. In the absence of objection, the letter will be printed in the RECORD.

The letter referred to is as follows:

GREENFIELD, MASS., *December 19, 1912.*

The Hon. HENRY CABOT LODGE,
Washington, D. C.

MY DEAR SENATOR LODGE:

* * * * * * *

The debate which you forwarded is conclusive to my mind that the facts which actually exist are not known either to you or the other Senators.

My father, Thomas Brinton Flower, was a clergyman of the Episcopal Church and had charge of the Church of the Messiah at Woods Hole, Mass., for nine years previous to the opening of the war. In September, 1861, he removed with his family to Ashfield, in this county, where he died in June, 1862, nearly three years previous to the damage to his property in Virginia—a very conclusive reason, it seems to me, why he never, himself, laid claim for any damage.

At that time I was a boy of 9; my mother was left with four small children, one older and two younger than myself. John Flower, who lived on the farm in Virginia, was brother to my father and was one of the men who voted that Virginia stay in the Union. He was arrested and placed in prison, from which he escaped, and for three months suffered untold hardship in his attempt to reach the North. He lived long enough after the war to go to Virginia and mark out the bounds of this farm and get it properly recorded. He informed my mother that everything had been done to protect her rights, the property having been taken by military authority for the preservation of the Army and had been properly appraised.

In the operations around Petersburg this farm was occupied by the Union forces and finally destroyed. The house was shelled by both armies while my Aunt Mary and 11 small children were in the cellar. After the engagement, the Union forces taking possession of the property, the family was sent North, with the exception of the oldest son, who was then about 16 and well acquainted with the surrounding country, who stayed for a time and aided Gen. Grant in his operations by showing the soldiers short cuts about the country.

There were three earth forts and hundreds of rods of earthworks thrown up on this farm.

In regard to laches in this matter, let me say that my mother went to Philadelphia, where my father was born, after his death, and that Col. Samuel B. Thomas, who married my father's sister, and who was secretary of state under Gov. Curtin during the war, told my mother that nothing could be done toward collecting the claim owing to the condition of the country; that appraisement of damages had been filed and that later the matter could be taken up.

She did later take the matter up in the seventies with some claim agent. What was done, I do not know. But the inclosed letter from Mr. Polluck will show you that I took the matter up with him in 1889.

Congressman Whiting, from this district, who is related by marriage to the family, took the matter up when in Congress and did not accomplish anything. Then Mr. Black, the present agent, took hold of the matter and has had it in charge for some years. You will see by this that there has been no neglect on our part toward pressing this claim. Mr. Black has always said that if we could interest you in the matter the thing would go through. So when Harold had the great pleasure of making your acquaintance the matter was brought to your attention.

My father, as I have learned from my mother, was a strong Union man. He voted, as I have been told, for Bell and Everett at the election when Mr. Lincoln was made President. The Flower family, or our branch of it, which came over with William Penn on his second trip, located in Delaware County, Pa., and have been there ever since. My father's sister was a very warm friend of Miller McKim, and was associated in some way with what was called the "underground railroad."

I have burdened you with this long letter, for which I hope you will excuse me, to show you if I could that it was impossible for any charge of disloyalty to be made against my father or any of the family, and to show that we have not been negligent in pressing this claim, but rather unfortunate.

Again thanking you for your great kindness in this matter, I am,
Sincerely, yours,

ARCHIBALD D. FLOWER.

Mr. LODGE. I think that some injustice, quite unintentionally, has been done to these most excellent people who are making the claim and who never would have made it unless they believed it was a thoroughly good one, as I believe it is. I wanted those facts placed before the Senate so that they could be before a subsequent committee and so that they may learn all the details, which are not without interest.

Mr. President, in discussing the amendment which the Senator from South Dakota proposed to the amendment offered by me I first showed how many grounds of claim put forward by the counsel for the French spoliation claimants have been satisfied by the court, in order to show that the court had not granted everything claimed, by any means, but that they had made a number of rulings which the claimants at least thought bore very hardly upon them.

I refer to what I have said previously, because so much time has elapsed since I first made those observations that I fear they have been forgotten even by the very small number of auditors I had the privilege of having.

I now want, Mr. President, to take up the question raised by the amendment of the Senator from South Dakota to the amendment which I introduced. I desire to refer to the claims included by the Court of Claims in their present decisions, and I wish to discuss the precedents of allowances by courts and commissions passing on international claims.

The French spoliation act of 1885, under which these claims are considered by the Court of Claims (23 Stat. L., 283), thus prescribed, in section 3, the rule of decision:

> And they shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same.

It will hardly be denied that this requirement laid upon the court the obligation to decide these cases according to the rules of law which had received the approval of our own highest domestic tribunals, as well as of the various commissions and courts which had from time to time in our past history adjudicated upon international claims.

A careful examination of the published records and decisions of a number of these tribunals shows that the allowances made by the court have in no case gone beyond those made by past courts and commissions, which have considered these claims at various times during the last hundred years. In many instances they have been less liberal than the allowances made by past commissions.

The questions suggested by a number of the remarks made in the summaries given in the last part of the Senate report show that the question of the correctness of at least the three following classes of allowances has been under consideration by the committee, and the deduction of these items is at least suggested in the report:

First. The freight earnings of the vessel for the voyage. These have been allowed by the Court of Claims at the rate of two-thirds of a fair freight for the voyage.

Second. The premium of insurance paid by the owner of the cargo or of the vessel upon her for the voyage upon which she was bound, which is allowed by the Court of Claims as one element entering into the value, and which would undoubtedly have been charged by the owner as one element of the expenses he had incurred to the purchaser of the cargo if the vessel and cargo had safely arrived at their point of destination.

Third. The payment of the full amount of loss incurred and paid by individual underwriters on vessels and cargoes, the question here being whether the premium is not to be deducted from the insurer's loss. Various comments throughout the report make it evident that one thought in drafting this report has been that the underwriter did not lose the whole amount which he paid, and that his net loss was only the amount paid less the premium he received for incurring the risk.

My examination of the proceedings to which I have referred shows that all of these items have always been allowed in full by past commissions passing on international claims, and are sustained in principle by the decisions of the Supreme Court of the United States, while there are other important items of allowance arising out of losses which the Court of Claims has not allowed.

A question very similar to this occurred in the settlement of our claims against Great Britain before the mixed international commission appointed under the Jay treaty of 1794. These claims were for spoliations committed by the British under circumstances entirely analogous to those committed by the French now in question.

William Pinkney, of Maryland, was commissioner on the part of the United States in that commission, whose opinion, delivered on behalf of the majority of the commission, was as follows in answer to a very similar objection made by the British commissioner:

> The last question which occurred at the board in this case respected the rule of compensation to be applied to it in relation to the cargo. The majority were of opinion that the claimants were entitled not only to the value of their merchandise but to the net profits which would have been made on it at the port of destination if the voyage had not been interrupted. This opinion proceeded upon the supposition that the voyage was wrongfully interrupted, and upon that supposition would seem to be free from exception. It has been questioned, however, and I shall, of course, assign my reasons for adopting it.
>
> There can be no doubt that the illegal capture and condemnation of this vessel and cargo have given to the claimants a title to receive from the British Government the value of the things of which they were deprived; but the question is whether they have not also a title to receive the profits that might and would have arisen from them.
>
> The right of the claimants to the cargo was a perfect one; and for that reason they are authorized to demand compensation for its value; but this right was in no respect better or more perfect than their right to proceed upon the voyage, and to make such profit of the goods as the situation of the destined market would at the time of the vessel's arrival enable them under all circumstances to make.
>
> When the claimants show (and a majority of the board have determined that they have shown it) that the cargo belonged to them—

that the voyage which the vessel (also the property of one of them) had commenced was a lawful one; that there was no ground upon which she could justifiably be seized or detained, they prove a complete right to prosecute that voyage without molestation and to acquire such advantages therefrom as in the course of trade might fairly be calculated on.

According to a written opinion filed by one of the board on this occasion, no compensation is due for the violation of this latter right; for it states "that to reimburse the claimants the original cost of their property and all the expenses they have actually incurred, together with interest on the whole amount, would be a just and adequate compensation." But what substantial reason can be assigned why one of the claimant's rights shall be selected as a proper object of compensation, while another of their rights, equally indisputable and equally violated, shall be left without any compensation at all?

No compensation for an injury can be just and adequate which does not repair that injury, but he who wrongfully deprives me of a lawful profit which I am employed in making can not be said to afford reparation until he has given me an equivalent for the advantages of which he has deprived me; to which advantages my right was as unquestionable as the right I had in the things from which they were to arise.

Rutherforth (1 Inst. Nat. Law, p. 105, s. 5) lays down the rule that "in estimating the damages which anyone has sustained, where such things as he has a perfect right to, are unjustly taken from him, or withholden, or intercepted, we are to consider not only the value of the thing itself, but the value likewise of the fruits or profits that might have arisen from it. He who is the owner of the thing is likewise the owner of such fruits or profits. So that it is as properly a damage to be deprived of them as it is to be deprived of the thing itself. But it is to be considered whether he could have received these profits without any labor or expense; because if he could not, then in settling the damages for which reparation is to be made, the profits are not to be rated at their full worth; but an allowance is to be made for the labor or expense of collecting or receiving them, and when the labor or expense is deducted from their full worth the remainder is all that he has lost, and consequently is all that he has any title to demand.

"In rating the damages which a man has sustained we are to estimate something more than the present advantage which he has lost; for the hope or expectation of future advantage is worth something; and if such hope or expectation is cut off by the injury, the value of it is to be allowed him. We must, however, in estimating this hope be careful not to estimate it as if the advantage were in actual possession. Proper deductions are to be made for the accidents which might have happened to disappoint his expectations. And in proportion as these accidents are greater or more in number, or more likely to happen, a greater abatement is to be made in consideration of them," etc. (Id., p. 416.)

"Not only the damages which a man sustains from an unlawful act are chargeable to them who do the act, but these damages are likewise to be made amends for, which are the consequence of such act." (Id., p. 409, s. 8.)

The foregoing quotations are supported by Grotius (Lib., 2, c. 17, s. 4–5) and also by Puffendorf. It is to be admitted that in the case before the board, the claimants' prospect of profits (provided insurance had not been made upon both profits and cargo) was not entirely certain; for the cargo might have been damaged or lost, and, of course, in the language of Rutherforth, we should be careful "not to estimate those profits as if they were in actual possession." But it is also evident that the profits were just as secure as the cargo itself, and were subject to no other risk than the cargo was exposed to. With a view to prices, there was no risk at all, since we resort to the prices which are proved to have been those at which the cargo might have been sold if it had arrived. In that respect we have facts by which to regulate our estimate, and not possibilities. If then the danger of loss of, or injury to, the cargo was the only circumstance which rendered the claimants' profits precarious, it is extremely easy to make an allowance for that hazard in the same manner as in ascertaining the value of the cargo itself. We have only to make a proper deduction for the sea risk—and for this the rate of insurance upon such a voyage as the vessel was engaged in will furnish us with the best possible rule. The rate of insurance is the value of the hazard, and it is that criterion upon which we may safely rely, since it is that value which is uniformly paid and received for the sea risk by those who are able, from their pursuits, and induced by their interests to calculate it accurately. (Life, Writings, and Speeches of William Pinkney by Henry Wheaton, New York, 1826, pp. 259–264.)

That is an extremely able argument, and, as the Senate well knows, Mr. Pinkney was one of the ablest and most distinguished lawyers in our history, and it has a very important bearing upon the question of the profits of the voyage.

I merely call attention to the fact that of this commission of 1794, where the cases were precisely similar to the class of cases involved in the French spoliation cases, the majority of the commission, which was a very strong one, overruled the position taken on behalf of the British Government that the whole liability of that Government was discharged by reimbursing the claimants the original cost of their property, all the expenses they had incurred, and interest on the whole amount.

Under the Florida treaty of 1819 with Spain we had another commission for the settlement of claims against Spain. This commission, however, differed from the British commission of 1794, to which I have just been referring, in the fact that it was a domestic tribunal of the United States, like the Court of Claims, and like the board of commissioners who distributed the Alabama award. They adjudicated upon claims originally existing against a foreign government, but which had, for a valuable consideration, been released to that government and assumed by the United States. So the Florida commission is entirely similar in its jurisdiction to the Court of Claims, and it was dealing in claims almost identical with the class of claims we are considering here.

That commission in its final report of its proceedings to the Secretary of State thus stated its allowance of freight and insurance premiums and of the principles which governed it in making such allowances (Moore's International Arbitrations, vol. 5, p. 4516):

In adjusting the amount of the claims allowed the commission has adopted these principles: Regarding the fund provided by the treaty as designed to indemnify claimants for actual losses sustained and not to realize profits which might or might not have been made, the board has generally taken up the voyage at its commencement and allowed the value of the vessel and cargo at that time. To the value of the vessel two-thirds of a fair freight for the passage in which the loss occurred has been added. A fair premium of insurance for the risk of such a passage has been also added to each of these insurable subjects. And the costs and expenses incurred in defraying their rights have been allowed to all claimants who have paid such and have offered any evidence from which the sums so paid might be inferred. Such has been the general mode of estimating the quantum of loss to be indemnified in most of the cases where the loss has been total.

The following from the report of that commission (Moore's International Arbitrations, vol. 5, pp. 4516, 4517) states the ground on which the claims of underwriters were allowed and also shows that in so doing no deduction of the amount of the premium was made from the amount of the insurance actually paid by the underwriter and received by the assured. The commission say:

And it was only when the American citizen who had sustained a loss provided for by the treaty, having been indemnified against this loss by an American underwriter, had abandoned or was bound to abandon and assign his interest in the subject insured to the assurer, that the claims of underwriters have ever been received. But, claiming as assignees of a party who had a good claim, these their derivative claims have always been allowed for the sum by them insured and paid, where that sum did not exceed the true value of the subject insured according to the principles settled by the board for ascertaining this value, as above stated.

In making such allowances to underwriters the commission was well aware that its effect would be to allow them more than they had lost by the amount of the premium received from the party insured, which premium he had voluntarily paid and must have lost in any event. So, too, in making the allowance of freight the commission was well aware that the full wages of seamen had not been paid, probably, in any of the cases where such freight was given. But in these and many other cases which occurred the board, having ascertained the full amount of the loss, distributed this amount so ascertained amongst the different parties claiming it before them and seeming to have a right to receive it (no matter in what character) without deciding or believing itself possessed of the authority to decide upon the merits of conflicting claims to the same subject.

It will be observed that in that decision of the Florida commission they awarded the claimants the premiums, although the premiums would have been lost in any event, and they also made an allowance of freight without deduction, as they state—

For wages of seamen.

I ask particular attention to this last statement as bearing upon the point which has been made against a number of these claims in the report of the Committee on Claims, in which the amount allowed to an underwriter by the Court of Claims as insurance actually paid has been diminished by the amount of the premium. As I have pointed out, the commission, under the treaty of 1819, made no such deduction, but allowed the underwriters the full amount of the loss, which they paid.

Its reasons are given for so doing. It is not believed that any court or commission which has ever allowed to an underwriter or insurer by virtue of the doctrine of subrogation the amount which he paid has ever diminished that amount by deducting therefrom the premium paid for the insurance.

But there was another commission relative to certain other claims against the Spanish Government which sat many years later than the first, to wit, in 1836 and 1837. That commission laid down the following complete statement of the rules which guided them (Moore's International Arbitrations, vol. 5, pp. 4541, 4542):

First. As to vessels: The value of every vessel must be estimated at her actual cost to the owner where that can be ascertained, and if not ascertained, her value at the commencement of the voyage will be deemed to be her true value, deducting therefrom a reasonable percentage for subsequent deterioration.

To her value thus allowed add two-thirds of a fair freight where the voyage was not completed.

In cases of capture and release, where doubts exist as to the probable grounds of capture, nothing is to be allowed for the detention of the vessel after capture, unless the delay has been unreasonable, and then only for the wages of the crew, expenses of their support, and damages incurred by the vessel during the detention.

Second. As to cargo: In cases where the cargo has been taken at sea the invoice cost will be deemed to be its true value, adding thereto the usual and ordinary shipping charges, the customary brokerage on the purchase of the goods, and a reasonable or fair premium of insurance for the particular voyage, said premium to be rated with that usual or current at the time of the shipment, and this premium is to be allowed whether the owner was his own insurer or not.

Where the property was seized on shore at the place of destination, and the market price there at the time of seizure can be satisfactorily ascertained, that price shall be the criterion of value. If from any cause such market price can not be ascertained, recourse must be had to the actual cost and charges as in other cases.

Third. Charges and expenses in defending the property, whether vessel or cargo, will be allowed where they have been actually paid in all cases where there has been a reasonable effort to defend or reclaim the subject.

Fourth. Where the property was recaptured and restored on payment of salvage the amount so paid, with incidental expenses, is to be allowed. In cases of ransom the actual sum paid is to be allowed, and where the property has been sold after capture and a proportion of its proceeds given up as the price of a partial restitution the sum so given up is to be deducted from the indemnity to be allowed.

Fifth. As to freight: A fair premium of insurance is to be allowed on freight, as on other insurable interests.

Sixth. In the distribution of the amount awarded reference is to be had only to the claimant's actual loss. Nothing is to be allowed for profits or anticipated gains. Whatever he has received under contracts of insurance is to be deducted from the award in his favor; but where insurers are claimants their claims are generally to be allowed for the sums actually paid, except in cases of loss especially adjusted between the parties, and then the intention of the parties at the time of settling their contracts is to be carried into effect.

These rules exclude the possible profit on which Mr. Pinkney made his argument, but in many other respects they are more liberal than those adopted by the Court of Claims. Premiums of insurance, for instance, were allowed by that commission whether they were actually paid or not, whereas the Court of Claims allowed such premiums only when actually paid. Charges and expenses in connection with the property were allowed by this commission, whereas we find no case in which the Court of Claims allowed such charges.

The Court of Claims allowed no ransom voluntarily paid, but only salvage actually decreed by a court and paid under compulsion.

Insurance on freight is only allowed by the Court of Claims where actually paid. The commission above quoted allowed it in addition to the freight itself in all cases.

Now, Mr. President, that shows as clearly as possible that the Court of Claims in dealing with these cases has been stricter and more severe than past commissions dealing with similar claims made under the Spanish and British treaties.

I will take next the case of the distribution of the Danish indemnity. Our Government had made a treaty with Denmark for the adjudication of claims in the case of vessels illegally seized by that country. That commission, sitting in 1832–33, made these rules (Moore's International Arbitrations, vol. 5, p. 4568):

Considering the absence of proof in some cases, and its imperfection in others, in relation to freight, insurance, demurrage, and damage owing to detention, and consequently, that exact justice can not be done in each particular case, comparing, besides, the several claims for freight, insurance, demurrage, and damage, with each other, and finding no standard therein, it is—

2d. *Ordered*, That in all cases of condemnation or detention there shall be allowed two-thirds of a fair freight for the passage in which the loss occurred (and) a premium of insurance at the rate of — per cent upon the value of the vessel and cargo, respectively, at the commencement of the voyage.

That was in reference, as I remember, to the stoppage of vessels in regard to the question of tolls in the Skagerrack, passing through the straits north of Denmark.

There was also an indemnity paid by the Government of Naples for illegal seizures made by that Government.

The commission to distribute that indemnity, sitting in 1834, 1835, made the following rules (Moore's International Arbitrations, vol. 5, p. 4585):

Ordered, 1. That in cases of condemnation, indemnity shall be made according to the actual value of the vessel and cargo, respectively, at the commencement of the voyage.

2. That a commission of 2½ per cent be allowed on the value of the cargo in full satisfaction for the purchase and charges thereon at the port of exportation.

3. Freight according to the registered tonnage of the vessel at and after the rate of $40 per ton.

4. All necessary expenses incurred at Naples by reason of illegal capture and condemnation to be allowed in full.

5. Interest at the rate of 20 per cent on the amount awarded.

I wish to call attention to the allowance of interest at the rate of 20 per cent, the largest yet found, although in all cases of commissions to distribute international indemnities interest is invariably allowed, whereas the Court of Claims has never allowed interest on French spoliation claims.

THE MEXICAN COMMISSION OF 1868.

In 1868 there was a Mexican commission to settle certain claims against that Government.

Sir Edward Thornton, the British minister, who was the umpire under the treaty of 1868 for the settlement of claims of the citizens of the United States against Mexico, made the following allowance of freight in a case of unlawful seizure of goods imported by sea and seized at the port of importation:

The umpire therefore feels it incumbent upon him to decide this claim is a just one and to award on account of it the sum of $7,145.85 Mexican gold, with interest at 6 per cent per annum from the 1st of December, 1854, to the date of the final award. The umpire has allowed the original value of the goods, with the costs of freight, landing, etc.; but he has not taken into consideration the profit upon the sale of the goods, because he thinks that the loss of this is sufficiently compensated by the assured interest of 6 per cent per annum at the end of a number of years. (Moore's International Arbitrations, vol. 3, p. 3135.)

This decision is a particularly strong one because it not only allows freight and expenses of landing in addition to the original value of the goods, but its refusal to allow profits is based upon the distinct ground that these are compensated for by the interest, which in that case exceeded the amount of the principal. In these French spoliation cases neither profits nor interest are allowed, which, I think, shows the moderation of these claims and the strictness of the Court of Claims in dealing with them as compared with all similar claims dealt with by prior commissions in similar cases in which the Government was involved.

PROCEEDINGS OF COURT OF COMMISSIONERS OF ALABAMA CLAIMS.

The proceedings of the Court of Commissioners of Alabama Claims on this subject of the allowance of freights and insurance premiums throw great light on the questions involved.

The proceedings of this court offer a peculiarly instructive analogy to those now before use. The claims, like the French spoliation claims, were in their origin claims arising out of the wrongful acts of a foreign government. Like them, the claims had been assumed by the United States, although upon different grounds than the French spoliation claims, having been so assumed in consideration of the payment of a large lump sum by the foreign government. Like the French spoliation claims, they were referred by act of Congress to a domestic tribunal sitting under the authority of the laws of the United States, by which tribunal these claims were passed upon as international claims, depending upon rules of international law, although the judgment was to be paid by the United States.

I will take up first the questions of the allowance to the owner of the ship or cargo of the premium of insurance paid by him. The syllabus of the case in which this point was decided——

Mr. CRAWFORD. Will the Senator permit me a question right there?

Mr. LODGE. Yes.

Mr. CRAWFORD. Was not the amount of the Alabama award amply sufficient to cover all the items to which the Senator is addressing himself—that is, the lump sum?

Mr. LODGE. It was more than sufficient; but I do not think that has any bearing on the merits of the cases or the principles on which that money was awarded under the Geneva arbitration, which was provided for by the treaty of Washington. Fifteen and a half million dollars, as I recall it, was paid to the United States and was in the Treasury of the United States, and it was just as much the money of the United States as anything else in the Treasury. Then the claimants came forward with their claims, which, of course, were against that fund, but the rules on which those claims were decided are precisely the same, it seems to me, as those relating to any other claims. The fact that the United States had money especially paid to it by a foreign government to meet the claims does not seem to me to touch the case. In the case of the French spoliation claims the United States received in consideration of assuming the payment of the French spoliation claims indemnity, or they were relieved from the payment of the claims against them. They took up these claims because the claims of their citizens were used as a set-off to the claims of the citizens of France.

As I was saying, the syllabus of the case in which this point was decided, that of Hubbell against United States, contained in Moore's International Arbitrations, an official work published by authority of the United States at the Government Printing Office, volume 4, page 4242, is as follows:

The measure of damage for goods destroyed by the Confederate cruisers is the value of the goods at the place and time of shipment, with charges and marine insurance actually paid, with interest on the aggregate so produced from the time of shipment till the date of destruction, at 6 per cent.

In support of this ruling the court said (pp. 4255, 4256):

From the earliest period in our judicial history actions have been brought by the owners of goods against persons other than the parties to the contract of affreightment, growing out of torts committed against the goods while in transit on their way from the port of lading to an intended port of discharge.

The earliest of these which reached the Supreme Court of the United States was in 1794. (Del Col *v.* Arnold, 3 Dall., 333.)

This was a case of a vessel wrongfully captured by the commander of the *Constellation*, an American vessel of war, and brought into the port of Philadelphia, where the captain instituted proceedings for her condemnation. Pending these proceedings the cargo was sold, and the consul of Denmark intervened in the cause, claiming the vessel and cargo as the property of a Danish subject. The cause was heard by the Supreme Court upon appeal, and Chief Justice Marshall gave the opinion of the court, wherein they fixed the standard of damages by directing in their decree "that the cause be remanded to the circuit court with directions to refer it to commissioners to ascertain the damages sustained by the claimants, * * * and that the commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including the insurance actually paid, and such expenses as were necessarily sustained in consequence of bringing the vessel into the United States, as the standard by which damages ought to be measured."

A large sum was awarded against Capt. Murray in pursuance of this decree, which he was obliged to pay, and which was afterwards reimbursed to him by act of Congress from the Treasury of the United States. (Act Jan. 31, 1805.)

The rule of damages thus established has been followed from that day to the present through a series of decisions entirely unbroken and unchanged. (*The Charming Betsey*, 2 Cr., 64; Maley *v.* Shattuck, 3 Cr., 458 (1806); the schooner *Lively* and cargo, 1 Gallison, 315 (1812); the *Anna Maria*, 2 Wheat., 327 (1817); the *Amiable Nancy*, 3 Wheat., 546 (1818); *L'Armistad de Rues*, 5 Wheat., 385 (1820).)

The same rule was applied in the case of an unlawful and unjustifiable seizure of a vessel by the officers of the revenue in 1824. (The *Apollon*, 9 Wheat., 362.)

These were cases, of course, against our own Government.

From this statement it will be observed that the Alabama Claims Tribunal in every case allowed a premium of insurance in addition to the original prime cost of the cargo and vessel.

The rule as to freight is stated in an opinion of the court which is peculiarly instructive in view of the fact that the act constituting the Court of Commissioners of Alabama Claims prohibited it from allowing "unearned freight" as well as "gross freights."

Mr. Hackett, in his able work entitled "The Geneva Award Acts", (p. 50), thus quotes this opinion, the reasoning of which he terms "eminently satisfactory":

What are "unearned freights," as employed in the act? What do these terms, so unusual in the language of judges, shippers, carriers, and underwriters, require us to exclude? By forbidding the allowance of unearned freights it was certainly not intended to allow only freights fully earned. Freight is fully earned, in the judicial as well as popular sense, when the vessel has reached her port of destination and the cargo has been delivered; a place in which she would not be in much danger of destruction at the hands of an insurgent cruiser. If so destroyed, the question of freight could not have arisen at all, for her charterers would then have been her debtors, and the value of the vessel only would have been lost to her owners. It is impossible to suppose that Congress could have put so frivolous a thing into a serious statute. It is just as clear that freights wholly unearned could not have been intended; that is, where no expenses had been incurred, no stores supplied, no cargo taken on board, nothing done by shipper or owner toward the commencement of a voyage. Here, again, the vessel would have been found in her dock and out of the reach of the losses of which the statute treats. Even if she were not, her case is effectually provided for by forbidding any allowance for prospective freights. The provision respecting "unearned freights" was evidently intended to embrace something different from that of the inhibition of prospective gains, and to have some practical effect on the distribution of the money in hand. Let it observed, then, that between these extremes—of freight wholly earned and freight wholly unearned—there is an ample territory in which judicial investigation has gone on from the dawn of commerce to the present hour, and the results are found along the whole track of the commercial law. A ship is made ready for sea, a charter party more or less formal is executed, her cargo is shipped, and she starts on her voyage. She has not then earned her freight, and on the shipper or charterer she has no legal claim until after the lapse of many months and the endurance of many perils. But her owner has spent time and labor in fitting her out, has supplied the necessary stores, advanced the wages of the crew, and subjected her to the largest risk to which property is ever subjected or paid to others the required compensation for assuming such risk. Can it be maintained that her freight is unearned in the large and general sense in which this term is used in the statute—unearned, without qualification—wholly unearned? Can it be denied that some part of it has been earned? Not as against the shipper, if he has done nothing to change the contract, but even as against him if he has interrupted the voyage, and certainly as against everyone who willfully or carelessly stops her progress. Here the decisions, European and American, have a uniformity scarcely to be met with in any other department of the law. (Rep., 84.)

This shows that freight was always allowed by the Court of Commissioners of Alabama Claims on precisely the same principles as were adopted by the Court of Claims in these very cases involving French spoliations, and that the same is true in regard to premiums of insurance.

But the Alabama claims were not the only claims for seizure of ships that arose out of the Civil War. In addition to our grievances against Great Britain, her citizens had theirs against us. A large number of British vessels with their cargoes were seized by vessels of the United States Navy during the Civil War on the charge either of attempting to break the blockade of the southern coast or of carrying contraband to the Confederates.

These vessels were libeled before our admiralty courts. Some of them were condemned; others released without any damages for detention or loss of freight. In all such cases the British owners preferred claims before the Mixed Commission appointed under the treaty of 1871 for the value of the vessels and cargoes with all incidental damages where they were condemned and taken away or where the vessel and cargo were restored for incidental damages.

In the case of the *Sir William Peel* (5 Wall., 517), a ship and cargo were stopped on their way to Matamoros, Mexico, at the mouth of the Rio Grande and libeled as prize of war on the charges both of attempting to break the blockade and of carrying contraband. The Supreme Court of the United States held that neither charge was established and ordered the restitution of the vessel and cargo, although without costs to either party on the ground that there was some probable cause justifying the seizure.

If the theory which seems to underlie the analysis of these findings made by the Committee on Claims is sound—that the mere value of the vessel and cargo represents the "actual property loss" (see report, p. 416)—the case should have ended there, and they would have become entitled to nothing more; that is, the case of the *Sir William Peel* should have ended with the decision of the Supreme Court.

Before the Mixed Commission, however, under the British treaty of 1871, they made claim for the damages attending their detention and loss of market, and that commission allowed them the enormous sum of $272,920 for these incidental damages after the Supreme Court had by its judgment restored the whole of their vessel and cargo to them. See Report of Her Majesty's Agent of the Proceedings and Awards of the Mixed Commission on British and American Claims, published at London, 1874, pages 107 to 113, where the entire history of this case is given.

In the case of the *Circassian* (2 Wall., 135) a British vessel was condemned by the Supreme Court of the United States with her cargo as lawful prize, affirming in this respect the decree of the district court below. The owners of the vessel and cargo and her insurers then presented a claim before the Mixed Commission under the treaty of 1871 for the value of the vessel and cargo, as well as for her freight. One claim made before that commission, that of Overend Gurney & Co., was for the freight and nothing else. On this item of the freight for the voyage that claimant was allowed $20,540. (Report of Her Majesty's Agent of the Proceedings and Awards of the Mixed Commission on British and American Claims, published at London, 1874, pp. 124, 132.)

Insurance losses were allowed on the same vessel amounting to $133,296, without anything being said as to deduction of premiums paid for the insurance.

In the course of some of the remarks on these Matamoros cases, as they are called, in this report on the Mixed Commission of 1871, pages 106, 107, it is said:

Reference was made to several cases before the commission under the treaty of 1794, in which it was said that the commissioners, as indemnity for captures held to have been unlawfully made, allowed not merely the value of cargoes, but net profits which would have been received if the cargoes had reached their port of destination, and which in some cases amounted to nearly 100 per cent.

These decisions of that commission fully show that what they allowed in cases of wrongful capture of British vessels by United States vessels was not the mere net value of the vessel and her cargo, but also included other damages directly sustained by the party, prominent among which was the loss of freight.

THE CHINESE INDEMNITY.

An examination of the decision of the Court of Claims in the claims against the Chinese indemnity fund in 1880 (15 C. Cls., 546, affirmed by the Supreme Court, 16 C. Cls., 635) shows (p. 576) that insurers recovered against this fund the full amount of the losses as paid by them, without any deduction for premiums of insurance.

BERING SEA CLAIMS AGAINST RUSSIA.

In 1902 there was an arbitration at The Hague of claims of certain American vessels unlawfully captured by Russia in the Russian part of Bering Sea on charges of illegal sealing. The arbitrator was Mr. T. M. C. Asser, counselor to the minister of foreign affairs of the Kingdom of Netherlands. His decisions are found in the report of the counsel for the United States (printed as Appendix I to the Foreign Relations of the United States for 1902).

He allowed in all cases, in addition to the value of the property, damages for "loss of catch."

That is, the possible catch of fish on the fishing voyage, which comes very near allowing possible profit. This was, under the circumstances under which those claims arose, the equivalent not merely of freight in other cases, but of loss of profits in addition. He stated in the judgment the following reasons for making this allowance (Foreign Relations, Appendix I, p. 453):

Considering that the general principle of civil law, according to which the damages should include an indemnity not only for the loss suffered, but also for the profit of which one has been deprived, is equally applicable to international litigation, and that in order to apply it it is not necessary that the amount of the profit of which one is deprived should be exactly determined, but that it suffices to show that in the natural order of things one would be able to realize a profit of which one is deprived by the act which gives rise to the claim.

That is the decision of a foreign subject, of which we took full advantage. This rule is more liberal than any that has been applied by the Court of Claims in these cases.

I now want to take up the decisions of the Supreme Court.

In the case of Murray *v.* Schooner *Charming Betsey* (2 Cr., 64), where a vessel was improperly captured by a United States public armed vessel, the court thus laid down (pp. 125, 126) the rule for the ascertainment of damages, the opinion being by Chief Justice Marshall:

That the said commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including the insur-

ance actually paid, and such expenses as were necessarily sustained in consequence of bringing the vessel into the United States as the standard by which the damages ought to be measured.

In Comegys *v.* Vasse (1 Pet., 195) the claim was made by an underwriter for the recovery from the insured of money which the insured had obtained through an award of the commission of 1819 on claims with Spain. The court, in the opinion by Mr. Justice Story, held that the underwriter was entitled to recover back all that he had paid, and made no deduction for any insurance premium. The court says (p. 214):

> The underwriter, then, stands in the place of the insured and becomes legally entitled to all that can be rescued from destruction.

And observe that no deduction was made of the premium.

Citing a New York decision made in the case of one of the insurers on a vessel captured by the French, the opinion says (p. 215):

> The case of Gracie *v.* The New York Insurance Co. (8 Johns., 237) recognizes the same principle in its full extent. That was a case of abandonment after a capture and where there had been a final condemnation, not only by the courts in France, but an express confirmation of the condemnation by the sovereign himself. One question was whether the jury were at liberty to deduct from the total loss the value of the spes recuperandi. The court held that they were not. Mr. Chief Justice Kent, in delivering the opinion of the court, said: "If France should at any future period agree to and actually make compensation for the capture and condemnation in question, the Government of the United States, to whom the compensation would in the first instance be payable, would become trustee for the party having the equitable title to the reimbursement; and this would clearly be the defendants (the underwriters), if they should pay the amount," etc.

This case recognizes to the fullest extent the right of the underwriter to recover the entire amount paid by him.

In the case of the *Baltimore* (8 Wall., 377, 386) the Supreme Court laid down the rule as to damage where the voyage is broken up by the act of a wrongdoer in the following terms:

> Restitution or compensation is the rule in all cases where repairs are practicable, but if the vessel of the libellants is totally lost, the rule of damage is the market value of the vessel (if the vessel is of a class which has such value) at the time of her destruction.
>
> Allowance for freight is made in such a case, reckoning the gross freight less the charges which would necessarily have been incurred in earning the same and which were saved to the owner by the accident, together with interest on the same from the date of the probable termination of voyage.

The point is also well stated by the circuit court of appeals in Mason *v.* Marine Insurance Co. (110 Fed. Rep., 752, 754; Lawyers' Repts. Annotated, 700, 704, 705):

> The earning power of the vessel was an incident inhering in her ownership.

In Hall & Long *v.* Railroad Companies (13 Wall., 367) the Supreme Court allowed a recovery by an insurer using the name of the shipper against the railroad companies which were responsible for the loss of the goods. The full amount of the insurance was thus allowed to be recovered. The very point was made in argument in that case (p. 367) that:

> In equity the insurance company could have no claim to subrogation until it had fully reimbursed the merchant, not merely the actual losses but the premiums previously paid.

Also that the insurer "has been fully paid for the risk it has assumed."

The court, however, overruled these arguments and held in the opinion (p. 373):

> That an underwriter who has paid a loss is entitled to recover what he has paid by a suit in the name of the assured against the carrier who caused the loss.

Thus the Supreme Court of the United States has recognized the justice in principle of all these classes of items in cases which have come before it.

It is my belief, Mr. President, that the Court of Claims in the allowance of freight and premiums of insurance to those who lost vessels and cargoes, as well as in its allowance to underwriters of the full amount paid them for the losses without deductions of the premiums, was simply following its unbroken precedents, only a few of which I have read, but all of which I have cited. If it had done otherwise, it would have violated such precedents and would have established a new rule.

Mr. President, I have a few pages more; it will not take me long to conclude, but I can not conclude in the three minutes which remain before the beginning of the impeachment case. I should therefore like to stop at this point.

Mr. CRAWFORD. Mr. President, I desire to state that at the close of the morning business to-morrow I shall ask the Senate to resume the consideration of this bill, and at the conclusion of the Senator's remarks, unless there is to be some further discussion of the amendment, I shall then ask the Senate to vote upon the pending amendment to the amendment offered by the Senator from Massachusetts, and also upon his amendment.

Mr. LODGE. That is perfectly agreeable to me.

INTERSTATE SHIPMENT OF LIQUOR.

Mr. SANDERS. I ask unanimous consent that on Monday, January 20, at 3 o'clock p. m., the bill (S. 4043) to prohibit interstate commerce in intoxicating liquors be taken up for consideration, and that the vote be taken on all amendments pending and amendments to be offered, and upon the bill itself, not later than the hour of 6 o'clock on that day.

Mr. WARREN. Mr. President——

The PRESIDING OFFICER. The Senator from Tennessee makes a request for unanimous consent——

Mr. SANDERS. I might say, in this connection, that this is one week later than the request made yesterday, and will give ample time for debate.

The PRESIDING OFFICER. The Secretary will read the request.

The Secretary read as follows:

> It is agreed by unanimous consent that on Monday, January 20, at 3 o'clock p. m., the bill (S. 4043) to prohibit interstate commerce in intoxicating liquors be taken up for consideration, and that the vote be taken on all amendments pending and amendments to be offered, and upon the bill itself, not later than the hour of 6 o'clock on that day.

The PRESIDING OFFICER. Is there objection?

Mr. WARREN. Mr. President, I shall have to object to that proposed unanimous-consent agreement and other unanimous-consent agreements proposed to be made at this time in the session, unless they are made subject to appropriation bills. All the great supply bills are yet to pass; the time is short in which they may be acted upon; and, I repeat, I shall have to object to such unanimous-consent agreements on that account.

Mr. SANDERS. I should like to inquire if the Senator would not be willing to agree to the proposition if appropriation bills are excepted?

Mr. WARREN. I will say to the Senator from Tennessee that, so far as my objection in that line goes, it would be perfectly agreeable to except the appropriation bills. I hardly think, however, the Senator from Tennessee ought to ask a unanimous-consent agreement in so thin a Senate as we now have; but my objection is entirely because of the condition of the appropriation bills. I shall ask that any unanimous-consent agreements shall except appropriation bills, which should have the right of way.

Mr. LODGE. Mr. President, I do not desire to object to the proposition of the Senator from Tennessee, but there are a number of Senators who, I know, desire to discuss the bill to which he refers, and I do not think an agreement of that kind ought to be made without the presence of those Senators. I therefore make the point that no quorum is present.

The PRESIDING OFFICER. The point of no quorum is made, and the Secretary will call the roll.

The Secretary called the roll, and the following Senators answered to their names:

Ashurst	Cummins	Lippitt	Shively
Bacon	Curtis	Lodge	Simmons
Bankhead	Dillingham	McCumber	Smith, Ariz.
Borah	Dixon	McLean	Smith, Ga.
Bourne	Fletcher	Martin, Va.	Smoot
Bradley	Foster	Nelson	Stephenson
Bristow	Gallinger	Newlands	Sutherland
Brown	Gore	Oliver	Swanson
Burnham	Gronna	Page	Thornton
Burton	Guggenheim	Paynter	Townsend
Catron	Hitchcock	Perkins	Warren
Chamberlain	Johnson, Me.	Perky	Wetmore
Clapp	Jones	Pomerene	Williams
Clark, Wyo.	Kenyon	Richardson	Works
Crawford	Kern	Root	
Cullom	La Follette	Sanders	

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Mr. TOWNSEND. I desire to announce that the senior Senator from Michigan [Mr. SMITH] is absent from the Senate on business of the Senate. I should like to have this announcement stand for the day.

Mr. SHIVELY. I wish to announce to the Senate that the junior Senator from New York [Mr. O'GORMAN], the junior Senator from Florida [Mr. BRYAN], the junior Senator from New Jersey [Mr. MARTINE], and the Senator from Arkansas [Mr. CLARKE] are absent on the business of the Senate. They are attending the funeral of the late Senator DAVIS.

Mr. SIMMONS. I wish to announce that my colleague [Mr. OVERMAN] is absent on account of sickness.

Mr. SHIVELY. I wish also to announce that the Senator from Alabama [Mr. JOHNSTON] is absent on account of sickness.

Mr. JONES. I desire to announce that my colleague [Mr. POINDEXTER] is absent from the Senate and the city on important business.

Mr. KERN. I desire again to announce the absence of the junior Senator from South Carolina [Mr. SMITH] on account of a death in his family.

Mr. CATRON. I wish to announce that my colleague [Mr. FALL] is absent on the business of the Senate.

The PRESIDENT pro tempore. On the call of the roll of the Senate 62 Senators have responded to their names. A quorum of the Senate is present.

IMPEACHMENT OF ROBERT W. ARCHBALD.

The PRESIDENT pro tempore (Mr. BACON) having announced that the time had arrived for the consideration of the articles of impeachment against Robert W. Archbald, the respondent appeared with his counsel, Mr. Worthington, Mr. Simpson, Mr. Robert W. Archbald, jr., and Mr. Martin.

The managers on the part of the House of Representatives appeared in the seats provided for them.

The Sergeant at Arms made the usual proclamation.

The PRESIDENT pro tempore. The Secretary will read the Journal of the last session of the Senate sitting as a Court of Impeachment.

The Secretary read the Journal of the proceedings of Monday, January 6, 1913.

The PRESIDENT pro tempore. Are there any inaccuracies in the Journal? If not, it will stand approved. The managers on the part of the House will proceed with their examination of the witness.

TESTIMONY OF ROBERT W. ARCHBALD—CONTINUED.

Cross-examination:

Q. (By Mr. Manager STERLING.) Judge Archbald, I think you stated that the first connection you had with the Katydid culm dump was when Mr. Williams came to see you on the 31st day of March, 1911?—A. I did not fix that date. I said that the matter was brought to my attention first by Mr. Williams.

Q. It was on that date, was it not?—A. That it was first brought to my attention?

Q. Yes.—A. No.

Q. When was it first brought to your attention?—A. I could not fix the date, but it was some little time prior to that.

Q. Was it not the day that you wrote a letter to Mr. May inquiring if it was for sale and the price of it?—A. Not at all.

Q. When did you write that letter?—A. I wrote it the day it is dated.

Q. When was that, with reference to the first time that Mr. Williams talked to you about this dump?—A. The exact length of time I can not give, but I should say it may have been two or three weeks after his first speaking of it.

Q. Your first connection with it, then, was some time in March, 1911?—A. I should think so, although I would not be positive about it. It may have been as early as February.

Q. I wish you would state now the substance of the conversation you had with Mr. Williams when he first came to see you.—A. I have had so many conversations with Mr. Williams on this subject that it would be very difficult for me to state what occurred the first time he mentioned it, but I will try to give it the best I can.

My remembrance is he said the Katydid culm dump could be obtained and was for sale, and that some money could be made out of it, and that he spoke of the fact that Mr. Robertson laid claim to it, and that an option could be obtained from Mr. Robertson, and that if an option could also be obtained for the interests of the Hillside Coal & Iron Co. then the matter would be in shape for disposition.

Q. What did you say in reply to that?—A. I do not think at first I said very much in regard to it. I have heard a good many things and statements by Mr. Williams——

Q. Well, Judge, just confine yourself to answering my question.—A. I could not tell you what I said in regard to it.

Q. You say now you do not know what reply you made to Mr. Williams?—A. No; I do not.

Q. Have you stated all that Mr. Williams said?—A. All that I remember as to that first or initial conversation.

Q. What was the purpose of Mr. Williams in coming to you with reference to the matter?—A. I could not tell you his mental purpose.

Q. What did he say was the reason he came to you?—A. He did not say why he came to me, that I remember.

Q. From what he said, what did you understand was his purpose in coming to you?—A. I should say that his idea was to have me assist him in carrying out a transaction of that kind—a purchase of the double interests in the Katydid culm dump and subsequently to dispose of the culm dump at a profit.

Q. In what way did he expect you to assist him?—A. I do not know.

Q. Did you assist him?—A. I did.

Q. In what way did he ask you to assist him; what did he ask you to do?—A. Well, your last question does refresh my memory. Either at that time or at a later time, before that letter was written, he told me that he had secured a verbal option from Mr. Robertson with regard to the interest he had in the matter, and that it only remained to secure an option on the interest of the Hillside Coal & Iron Co., and then it would be complete, and he wanted me to see whether that could be obtained from Capt. May.

Q. Then you do know that his purpose was to get you to intercede with the coal company and the railroad company for their interest in this property?—A. I would not adopt your words.

Q. State it in your own words, Judge.—A. He desired me to see whether an option could be obtained upon the interest of the Hillside Coal & Iron Co. in that dump. He further stated that Capt. May was under obligations to him, and he thought that Capt. May would look favorably upon it. My remembrance—it is somewhat indistinct, but still I have a faint remembrance—is that the first suggestion on his part was a letter of introduction to Capt. May.

Q. Did he say that he had been to Capt. May?—A. He did not.

Q. You knew that he had not been to Capt. May, did you not?—A. Knew that he had or had not?

Q. Yes.—A. I do not know whether he had or had not, but I think he had not.

Q. What reply did you make to him when he told you that he would like a letter of introduction to Capt. May?—A. I can not give exactly the words with regard to it.

Q. Give the substance of what you said.—A. My impression is that prior to the letter which I did eventually give him I had a conversation over the telephone with Capt. May about the matter, asking whether it was possible that the interest of the Hillside Coal & Iron Co. could be obtained.

Q. You did not give him any letter of introduction?—A. No, sir; I did not.

Q. What reason did you give Mr. Williams for not giving him merely a letter of introduction?—A. I do not think I gave him any reason, and I am not sure that that was the case; but I just have a faint remembrance on that point. When the letter which is now in evidence here was produced before the Judiciary Committee I expected the form of it would be a letter of introduction. I was very much surprised when I found it was couched in the terms in which is was couched.

Q. That is, you thought so up to the present time, until you saw it recently?—A. Not up to the present time; no.

Q. Well, up to the time of the investigation?—A. Up to the time of the hearing last May before the Judiciary Committee.

Q. The letter you refer to is the one dated March 31, in which you simply inquire of Capt. May if their interest in the Katydid dump can be purchased, and at what price. That is the letter you refer to?—A. I refer to the letter of March 31, which is not quite couched in the way you have stated.

Q. When you wrote that letter you understood you were a partner in the enterprise, did you not?—A. I understood not that I was a partner, but that I was participating in the matter.

Q. And that you were to share in the profits?—A. I assumed that I would share in the profits.

Q. When did you and Mr. Williams come to that agreement?—A. There was never any definite statement or any definite agreement in regard to it.

Q. Is it not true, Judge, that you declined to give him a letter of introduction——A. I do not remember that I did.

Q. Wait until I finish my question. [Continuing.] You declined to give him a letter of introduction until such time as he had suggested to you that he would share the profits with you?—A. Absolutely not——

Q. Now, wait. And, then, afterwards you wrote this letter inquiring about the possibility of buying it?—A. There is not a word of truth, if you will permit me, in that suggestion.

Q. How did it come that you declined Mr. Williams's request for a letter of introduction——A. I do not say that I declined his request——

Q. Let me finish my question. That you declined to give him that letter, but, on the other hand, wrote a letter over your own name inquiring if they would sell the dump and put a price on it?—A. I do not say that I ever declined to give him a letter of introduction. I do not remember that I ever did decline.

Q. But when you wrote that letter you understood you were to share in the profits?—A. I certainly did.

Q. When did you come to that understanding?—A. Simply by reason of the conversation or the conversations I had with Mr. Williams, because he stated that if these conflicting interests were obtained the dump could probably be sold at a profit, and he mentioned several concerns that he thought would be likely to be interested in purchasing. That was one of the first things I asked him about.

Q. How did he say that; did he say "We can sell it at a profit"?—A. I do not remember.

Q. Or did he say, "If you will assist me I will share the profits with you"?—A. He never said anything of the kind.

Q. But you inferred from all the talks you had that he proposed to give you a part of the profits?—A. I did.

Q. And when you came to that conclusion or understanding with Mr. Williams, then you wrote this letter inquiring if they would sell it and the price of it?—A. No; that is not so.

Q. Well, you did not write the letter until you had come to that conclusion, did you? You knew at that time that you were to share in the profits?—A. Yes; I assume that I knew at that time that I was to share in the profits.

Q. And you gathered from Mr. Williams's conversation that what he wanted you to do was to intercede with Mr. May, the superintendent of the Hillside Co., for their interest in this dump?—A. No, sir.

Q. Well, what else did he ask you to do?—A. There was no question of intercession or interceding.

Q. What did he call it?—A. He did not use that word.

Q. What did he call it, Judge?—A. I can not give you the exact word. It was simply that an effort was to be made to secure the interest of the Hillside Coal & Iron Co., an option on that——

Q. Why do you object to the word "interceding"?—A. Because it carries a meaning that I do not think is in the case.

Q. Do you say, Judge, that what you did was not simply interceding with this company to get this dump?—A. It certainly was not.

Q. When you telephoned Capt. May what did he say to you?—A. That is rather indefinite in my mind.

Q. What did you say to him?—A. I will give you my best impression about it: I asked him whether the company had an interest in the Katydid culm dump and whether it was for disposition, and my remembrance of his answer is that the situation there was somewhat peculiar and he could hardly say whether they would dispose of it or not. And I think in that connection, although I would not be sure whether that occurred before the writing of the letter or whether it occurred afterwards, he further said, either at one time or the other, that Mr. Richardson was to be in Scranton and that he would bring the matter up to him.

Q. He asked you to write the letter, did he not?—A. Capt. May ask me to write the letter?

Q. Yes; he asked you to write the letter, did he not?—A. No; I do not remember that.

Q. He did not?—A. I do not remember——

Q. Before this had occurred, however, you had inquired of Mr. Williams if he thought he could sell the dump?—A. Yes, sir; I had.

Q. And he thought that Mr. Boland could find a purchaser?—A. He spoke of Mr. Boland possibly finding a purchaser; yes.

Q. Had you seen the dump before that time?—A. I never saw the dump until the last of August, 1912.

Q. You did not go to see it until——A. No, sir.

Q. Why did you not go to see it before you undertook to buy it, Judge?—A. I do not know. I was busy in other matters. I simply did not go. I thought I knew where it was. I found afterwards when I came to see it actually that I was mistaken.

Q. If you had seen it could you have formed some estimate of its value?—A. I do not believe I could.

Q. You were not experienced in coal dumps?—A. I certainly am not; no, sir.

Q. You would not know how to go about it to make an estimate of the coal in a dump?—A. I would not.

Q. So you simply took Mr. Williams's word for that?—A. I did; that is, in part.

Q. After you had written to Capt. May and he had failed to answer your letter for some time you called him up by telephone?—A. Well, I say I can not tell you about that. After I wrote that letter my remembrance is that I saw Capt. May once or twice. As I testified yesterday, I not infrequently met him on the street, and I spoke about the matter to him. I think also very possibly I called him up once by telephone and asked about it.

Q. About how many times did you talk with him between the time you wrote the letter and the time you went to New York?—A. Oh, I should say three or four times.

Q. And he invariably told you that he did not know about the matter yet; that he did not know whether they would sell it or not, and also suggested to you that it had not been the practice of the railroad company to sell its coal properties, did he not?—A. You put two questions in one, and I can only answer one at a time. I will answer either of them.

Q. Answer them in succession.—A. I will have to ask to have the question repeated, the first and last half.

The Reporter read the question.

The WITNESS. He said nothing whatever in regard to the practice of the company about selling their culm dumps, and, on the contrary, I knew somewhat differently. He did say whenever I spoke to him about it, as I remember, that the matter had not yet been decided.

Q. Do you remember when Mr. Williams came to your office and told you that Capt. May had seen Mr. Richardson and that Mr. Richardson had advised against selling the dump?—A. Mr. Williams never told me that.

Q. Did he ever tell you that Capt. May had told him that he had seen Mr. Richardson?—A. He never did.

Q. Did he tell you that Mr. May would not talk to him about it?—A. He never did.

Q. What did he tell you about what had occurred, when he had been to see Capt. May?—A. He went to see Capt. May, as I understand, only once. That was when he presented that letter. Capt. May at first wanted to ask him a larger price than he, Williams, thought it was worth, and they finally arrived at the price which was named.

Q. On the day of the letter?—A. Yes.

Q. The 31st of March?—A. Yes, sir.

Q. Do you say that they then agreed on the price of $4,500?—A. I so understood. That was the report made to me by Mr. Williams.

Q. Do you not know that in September, when he went there to get the option, they discussed——A. Oh, I beg your pardon; it was in September.

Q. On the 31st of March they did not discuss the price at all?—A. That is true.

Q. What, if anything, did Mr. Williams tell you Capt. May had said to him?—A. I can not remember about that. When he came back about that date, I can not remember what he said.

Q. Do you not remember whether he said that Capt. May said that you could have it or could not have it?—A. He certainly did not say that Capt. May said they could have it.

Q. Do you remember his coming back and seeing you in regard to it?—A. I remember his coming to tell me that he had presented that letter.

Q. While you were waiting for a reply from Capt. May, Mr. Williams came to see you quite frequently?—A. He came to see me several times, yes, while I was at my office in Scranton.

Q. And to see you about this matter?—A. Yes.

Q. To have you further urge Capt. May to answer your letter?—A. He was anxious to have the matter closed. He spoke about Mr. Robertson being anxious, too, and that Mr. Robertson was rather restive about it.

Q. And finally you told him that you were going to see Mr. Brownell?—A. I finally—I think I said that; yes.

Q. And you told him you would go to New York and see Mr. Brownell?—A. I told him I would see Mr. Brownell while I was in New York on other business.

Q. I think you said yesterday that you did not remember any conversation with Mr. Williams at that time about the Lighterage case?—A. I do not remember ever having spoken of the Lighterage case to Mr. Williams.

Q. You did have the briefs and the petitions——A. Well, I had the record.

Q. And the records in cases 38 and 39 on your desk in your office in Scranton in the month of June, did you not?—A. I think I did; but I had the briefs and the record tied up and in separate packages by themselves either upon my desk or upon my mantel where I kept——

Q. Tied up in what way?—A. I think tied up in red tape.

Q. Did they have a wrapper around them?—A. No.

Q. They were lying there on your desk where anyone in your office could see them?—A. Either upon my desk or on my mantel.

Q. There was not anything on any printed matter connected with those cases in which the word "lighterage" appeared?—A. No.

Q. Do you know how Mr. Williams learned that you were considering the Lighterage case if you did not tell him?—A. I do not know; I could make a guess——

Q. Wait, now. If you did not tell him, do you know how he learned you were considering the Lighterage case?—A. I could only guess.

Q. You will not say that you did not talk with him about the Lighterage case?—A. I have no remembrance about talking with him. I think I would remember it if I had talked with him.

Q. Do you remember his asking you what "lighterage" meant——A. I do not.

Q. And that you explained to him that it related to tugboats at New York.—A. I do not remember anything of the kind.

Q. You did go to New York to see Mr. Brownell?—A. I saw Mr. Brownell when I was in New York.

Q. That was on the 4th of August?—A. It was.

Q. You said yesterday that you said to Mr. Brownell, or gave as your reason for coming to see him, that you wanted to talk to him about the title to the Katydid culm dump.—A. Not necessarily that.

Q. What did you say?—A. I told him I understood that the question of the title or the conflict of title between Robertson & Law or Mr. Robertson and the Hillside Coal & Iron Co. had not only been passed upon by their local attorneys, Judge Willard, of Willard, Warren & Knapp, but also had been referred to him as the counsel of the company in New York.

Q. What else did you say to him about it?—A. I told him that I was seeking to get both those options, and that a tentative arrangement had been made with Mr. Robertson by which he had agreed to sell for a certain figure, and if the title of the Hillside Coal & Iron Co. could be obtained that that would complete the title, and the matter could be disposed of, and there would be no question as to a conflict or diversity as to whether it was owned by all or who owned it.

Q. Were you concerned in getting the controversy disposed of that might arise between Robertson & Law and the Hillside Coal & Iron Co. or were you interested in getting the title in yourself?—A. I was not concerned in settling the controversy between Robertson & Law and the Hillside Coal & Iron Co. I was concerned in trying to buy the dump.

Q. That is what you went there for, is it not?—A. It certainly is.

Q. And you told Mr. Brownell that you wanted to buy it?—A. I do not remember that I said so in that way.

Q. The conversation you had with him about the title was merely incidental, was it not, to your main purpose?—A. It was introductory.

Q. To your purpose?—A. Yes.

Q. And he referred you to Mr. Richardson?—A. He told me that Mr. Richardson was the person to see.

Mr. CULBERSON. Mr. President, I wish to ask a question.

The PRESIDENT pro tempore. The Senator from Texas will send it to the desk.

Mr. CULBERSON. There are two questions.

The PRESIDENT pro tempore. The Senator from Texas sends to the desk two questions to be propounded to the witness. They will be propounded one at a time in the order of their number.

The Secretary read as follows:

Who, as between you and Williams, introduced the subject of the Lighterage case?

The WITNESS. I do not remember that I ever talked with Mr. Williams about the Lighterage case. I have no memory that I ever did.

The PRESIDENT pro tempore. The Secretary will read the second question.

The Secretary read as follows:

State fully the conversation on this subject.

The WITNESS. I can not state the conversation because I do not remember any.

The PRESIDENT pro tempore. The manager will proceed.

Q. (By Mr. Manager STERLING.) After you had talked with Mr. Richardson, which was the 4th of August, you met Mr. May on the streets of Scranton?—A. About three weeks later.

Q. That was the 29th of August?—A. I have not the means by me to fix that date exactly.

Q. He told you to tell Mr. Williams to come around and he would give him the option?—A. That in substance.

Q. Do you know why he told you to have Mr. Williams come around?—A. I do not know why he said it in that way.

Q. Did you suggest to him you were the one who wanted the option?—A. I did not in that conversation.

Q. Do you know why the letter giving the option was addressed only to Williams and not to you and Williams?—A. I do not.

Q. He brought you the option when he received it, did he not?—A. He brought back the option after he had obtained it from Capt. May in the form in which it appears.

Q. When you got that you considered that you and Mr. Williams had an option on the entire title of this dump, excepting the Everhart and Brooke Land Co.'s interests, did you?—A. I understood that the paper that Capt. May had given and the subsequent paper that was secured from Mr. Robertson practically controlled the title of the dump.

Q. Up to the time you got the option of the Hillside Co. you have related all you did in connection with the matter——A. All——

Q. Wait. Let me finish. That is, your conversation and your letters to Mr. May and your visit to Brownell and Richardson, the officials of the Erie Railroad Co., in New York? That is all you had done in connection with the matter up to that time?—A. That is all that I remember. Of course, you did not ask me with regard to what happened with Mr. Richardson in New York.

Q. No.

Mr. CULBERSON. Mr. President, I propound a question to the witness.

The PRESIDENT pro tempore. The Senator from Texas sends to the desk a question which he desires propounded to the witness, and it will be read to him by the Secretary.

The Secretary read as follows:

Why did you say awhile ago that you knew how Williams came to think of the Lighterage case? State fully.

The WITNESS. I do not think that I have said that I knew how Mr. Williams came to know of the Lighterage case. I said I might make a guess.

Mr. CULBERSON. That is what I want, Mr. President.

The WITNESS. I am perfectly willing to make the guess, if the Chair says that I can.

The PRESIDENT pro tempore. The Chair hears no objection.

Q. (By Mr. Manager STERLING.) Make a guess, Judge. Go on.—A. In one of two ways: He either got that information from Mr. Boland, which seems to me most likely, or he may have heard me speaking of the Lighterage case to others in my office, not to him.

Mr. CULBERSON. I should like to have that developed.

Mr. Manager STERLING. I will do so, Senator. [To the witness:] Who had you talked to in your office about the Lighterage case in the presence of Williams?—A. I can not tell you.

Q. Do you recall any occasion when you talked about the Lighterage case to anyone in your office, regardless of whether or not Williams was present?—A. I do not recall distinctly talking to anyone about the Lighterage case, but the Lighterage case was made a subject of considerable newspaper comment. It was quite an interesting case. It was one of the first cases that had been argued before the Commerce Court and one of the first cases that we had tentatively decided. It involved nice questions. My remembrance is that I did state to some lawyers who were present in my office at one time or another the points that were involved in that case.

Q. Can you name any of the lawyers you talked with about it?—A. I can not.

Q. So, at the present time, you would not say that you did talk to anybody in the presence of Williams about the Lighterage case?—A. I can not remember that I did.

Q. Now, how did William P. Boland know about the Lighterage case?—A. I can not tell you.

Q. Do you know whether he knew anything about the Lighterage case or not?—A. I could not know, with one exception.

Q. Well, what is it?—A. In the notes of Miss Mary Boland, which she took, there is a mention, I believe along in September, of the Lighterage case.

Mr. WORKS. Mr. President, I should like to put a question.

The PRESIDENT pro tempore. The Senator from California sends to the desk a question which he desires propounded to the witness, and it will be read to him by the Secretary.

The Secretary read as follows:

Did it occur to your own mind at any time during the pendency of these negotiations that your official position might have weight in inducing May or other officers of the company to come to satisfactory terms?

The WITNESS. I had no idea of that, and I would like to explain, if I may. When dealing with Capt. May, so far as I was dealing with him, I was dealing with a man who had known me for a great number of years, and whom I had known. I knew him so well that I knew my position would have no influence upon the matter. I presented the matter to him simply as a business proposition and expected him to treat it in that way, and only in that way. I knew that the matter was finally to be disposed of by Capt. May.

Mr. HITCHCOCK. Mr. President, I send to the desk a question to be asked.

The PRESIDENT pro tempore. The Senator from Nebraska sends to the desk a question to be propounded to the witness, which will be read to him by the Secretary.

The Secretary read as follows:

What was the reason for thinking that you would be more successful than Williams in inducing the company to give an option on the Katydid dump?

The WITNESS. I think my position in the community is a little different from that of Mr. Williams, and that I would be

more likely to secure it than he could. That is entirely distinct from my judicial position or my position as a judge of the Commerce Court at that time.

Q. (By Mr. STERLING.) Do you know whether Mr. Williams——

Mr. CULBERSON. May I ask another question?

The PRESIDENT pro tempore. The Senator from Texas will send it to the desk. [After a pause.] The Senator from Texas sends to the desk two questions, which will be propounded in the order in which they are numbered.

The Secretary read as follows:

When Williams was in your office, was the docket of the court in your presence?

The WITNESS. There was no docket, if I may so say. There was what I have here—what I would call a calendar. It is among my papers there, and I would be very glad to produce it.

Mr. WORTHINGTON. It was marked and put in evidence yesterday.

Mr. MARTIN. It was handed to the Secretary yesterday.

The WITNESS. It is a green-covered book of the character of the one I hold in my hand. That is the only docket. It is called a docket, but I should call it an argument list, using the phraseology we are accustomed to in Pennsylvania, or a calendar. That was prepared for the court, and as we met in October it was in my hands probably some time about the middle of September; and on that list——

Mr. CULBERSON. Let the second question be read.

The PRESIDENT pro tempore. The second question sent to the desk by the Senator from Texas will be read by the Secretary.

The Secretary read as follows:

State fully the cases in the docket and if the Lighterage case was shown by it.

The WITNESS. On that document, or argument list, on page 12 and No. 38, appears the Baltimore & Ohio Railroad Co., petitioners, the Brooklyn Eastern District Terminal, John Arbuckle, and William A. Jamison, intervening petitioners, against the United States, as respondent, by the Interstate Commerce Commission, Federal Sugar Refining Co., intervening respondents. That is the so-called Lighterage case, spoken of sometimes as the Sugar Refinery case. On the opposite page to that there appears this, after giving the date of filing in the Commerce Court:

To set aside an order of Interstate Commerce Commission affecting lighterage charges on sugar in and near New York Harbor.

That appears on that, but I venture to say that it is in rather an obscure position, and a person would have to know where he was hunting and what he was looking for to find it.

Mr. CULBERSON. Unless it be shown to him.

The WITNESS. Yes, sir; unless it be shown to him.

Q. (By Mr. Manager STERLING.) Now, that docket did not come to your table until the 15th of September?—A. I do not know just what time in September.

Q. You know now, do you not, that Williams knew something about the Lighterage case before that?—A. I do not know that he did.

Q. Do you not know that the notes taken by Mary Boland on the 5th day of September, 10 days before you got that, gave the substance of a conversation which Williams had with Boland, where he told you about the Lighterage case?—A. I do not know the date of Mary Boland's notes. I do not know the date when that docket was in my hands in September.

Q. You say about September 15.—A. I do not.

Mr. WORTHINGTON. I certainly think the manager does not want to mislead anybody. Those notes are in evidence and the dates appear, the 18th and the 28th of September. They are in evidence.

Mr. Manager STERLING. I should like to suggest to counsel that he will not take that for granted. It is not my purpose to mislead anybody.

Mr. WORTHINGTON. I so stated.

Mr. Manager STERLING. I object now to counsel interfering in this examination, because he can correct any of the mistakes I make when I am through. [To the witness:] You think perhaps Williams got his idea about the Lighterage case from Boland?—A. I say that is one of the guesses which I would make with regard to it.

Q. Do you base it on the fact that there is something in Miss Boland's notes about the Lighterage case?—A. In part; yes.

Q. The notes purport to be a statement made by Williams to Boland and not by Boland to Williams about the Lighterage case, do they not?—A. I will not say what those notes purport to state.

Q. So if the notes indicate anything it is that Williams gave information to Boland instead of Boland giving information to Williams?—A. I pass no judgment on what the notes say.

Q. Assuming that that is the fact——

Mr. POMERENE. Mr. President——

The PRESIDENT pro tempore. Does the Senator from Ohio desire to propound a question?

Mr. POMERENE. I desire to propound a question.

The PRESIDENT pro tempore. The manager will please suspend for a moment. The Senator from Ohio presents the following question, which will be propounded to the witness by the Secretary.

The Secretary read as follows:

If the fact that the difference in your and Williams's position in the community would give you more influence than Williams had in conducting negotiations with May and his corporation associates, did it not also occur to you that your judicial position would also help to influence them in that transaction?

The WITNESS. I should answer that no. I had no idea that my official position would enter into the question at all, by reason of what I have stated.

The PRESIDENT pro tempore. The manager will proceed.

Q. (By Mr. Manager STERLING.) Williams was in your office two or three times a week from the 31st of March down during that summer, was he not?—A. I would not fix the number of times a week.

Q. How often?—A. He might have been there once a week.

Q. And sometimes oftener?—A. He might have; yes.

Q. Do you understand that May knew that you had a financial interest in this transaction?—A. I assumed that he did. That I had a financial interest in it?

Q. Yes, sir.—A. I assumed that he did.

Q. Did you invest any money in the enterprise?—A. I did not.

Q. Did you expect to, at any time?—A. I did not think it would be necessary.

Q. Your idea simply was to get an option and then sell it at a profit?—A. That is a very familiar way of dealing with matters up there.

Q. I am not asking about the custom.—A. That was my idea.

Q. So all you did was to intercede with May, Brownell, and Richardson for this dump?—A. I am not going to adopt that word.

Q. Do you say that you did something else?—A. I did not intercede with anybody.

Q. Oh, well, what word would satisfy you, Judge?—A. I will not suggest.

Q. Did you do anything then except writing letters and telephoning and making personal visits to these three officials of the company that owned this dump? Did you do anything else?—A. I think not. That is, I do not remember that I did, except when it came to the sale of the property, or the attempted sale of the property.

Q. When you sold it to Conn what did you do?—A. We had an agreement that I thought was going to be complete.

Q. And that failed by reason of the fact that Conn's attorneys would not accept the title?—A. They felt as——

Q. Just answer my question?—A. I can not.

Q. Well, did it fail by reason of the fact that they would not accept the title?—A. Yes; you may put it that way.

Q. Did they suggest to you anything new about the title, when you had the conference with them, that you had not known before?—A. The matter came out when we met in Judge Knapp's office—Judge Knapp, of Scranton, I am speaking of—the attorney for the Hillside Coal & Iron Co. I found that all that the Hillside Coal & Iron Co. would do would be simply to convey their interest, and I anticipated that they were going to sell not simply that but whatever right and title they had by reason of their operation of the Consolidated Breaker, and by virtue of the fact that they were joint owners or tenants in common in regard to that.

Q. At that time had you prepared the option for the sale to Conn?—A. No.

Q. When did you prepare that?—A. When we gathered at Judge Knapp's office?

Q. Yes.—A. Yes; I think I had.

Q. You had already prepared it and submitted it to Conn?—A. Yes; and Mr. Conn, I think——

Q. Did the contract which you prepared for Conn purport to warrant the title?—A. It did not.

Q. You were not intending to convey to Conn anything except what you got from the Hillside Co. and Robertson in that contract, were you?—A. I contemplated making a valid sale.

Q. Just answer my question.—A. I can not.

Q. Was the contract which you prepared for Conn, selling him this dump, of such a character as to warrant the title to him?—A. Yes; it was.

Q. All of the title?—A. Yes.

Q. Did it have any provisions in it about royalty to the Everharts?—A. It did.

Q. And the Brooke Land Co.?—A. The Everhart interest was practically included in that by general designation.

Q. The contract which you prepared for Conn covered all those interests, did it not?—A. I would not say that, because the contract it not before me. It is in writing.

Q. It covered it just as the option which May made to Williams covered it?—A. I can not tell you; I have not the contract before me.

Q. You remember that May provided in the option that it was subject to the royalty interests of these people?—A. He did not——

Q. Do you remember whether it said anything about that?—A. It said on all sizes above pea there would have to be royalty.

Q. That is what they had been paying on?—A. I do not know about that.

Q. And the contract which you prepared for Conn had the same provision?—A. It followed that same provision.

Q. So you were conveying to Conn just what you were getting from Mr. May, and you did not intend to convey anything else, did you?—A. I did not have anything else to convey, but I had a different idea of what I would be able to convey or what Mr. Williams and I had been able to convey after I had seen Judge Knapp.

Q. After that you went to Conn and asked for this contract, did you?—A. That was along in March.

Q. March, 1912?—A. Yes, sir.

Q. Why did you do that?—A. Because I wanted to have the matter either go on, be concluded—that is to say, brought to an end—or——

Q. Was that after Scraggs had told you about the investigation in the Department of Justice?—A. Yes; it was.

Q. It was after that?—A. Yes.

Q. You stated yesterday that you wanted to take it up because you did not want to be a party to a contract where it would get the purchaser into a lawsuit. That was one of the reasons why you took up this contract from Conn?—A. I did not think that the property was in a shape or we had the title to it that would justify us in going on and making a sale.

Q. Then why, after that, did you make the option to John Henry Jones on the 6th of April?—A. Mr. John Henry Jones never had—you are referring to Mr. Thomas Starr Jones?

Q. I think that is right. You did that, did you not?—A. I did not make an option, and I think I explained yesterday how that option came about.

Q. You dictated the option?—A. Oh, I dictated the option.

Q. And Williams signed it in your presence?—A. He did.

Q. That was on the 6th of April, after you had taken up the Conn contract, in which you had given him an option for 10 days at $25,000?—A. Yes.

Q. Why, Judge, did not the consideration of the title affect you then, just the same as it affected you with reference to the Conn title?—A. I think I explained, or endeavored to explain, that yesterday in my examination in chief. The talk with Mr. Jones leading up to that option was that he was to take care of the outstanding interest in the Everharts, and that neither Mr. Williams nor myself would be responsible about that. He spoke of doing that at first by making a deposit of a certain proportion of the option price in case of sale in a bank for the benefit of the Everharts. After some consideration I did not agree to it, and finally the option was worded in the way it is worded, and it was limited to Mr. Williams, because the option only undertook to give him such a title as Mr. Williams had by virtue of the paper which he had from Capt. May and from Mr. Robertson.

Q. You do not mean to say that he was to give $25,000 for Williams's interest?—A. Such interest as I had.

Q. So it covered your interest just as much as though you had signed it?—A. Oh, yes.

Q. You say the reason you gave that option to Jones was because he agreed to take the title and take care of the Everharts and the Brooke Land Co.?—A. Yes, sir; because there was——

Q. Wait, now. That answers the question. The contract which was prepared for Mr. May provided that he should take care of those interests in the very same way, did it not?—A. The contract speaks for itself. I will not undertake to interpret it.

Q. Do you not think that the contract which you prepared for Conn made him responsible entirely for any claim that the Everharts and the Brooke Land Co. might make or have against this property?—A. I will not undertake to interpret the contract without seeing it.

Q. You do say that there was provision in there about their interests?—A. I do not bear in mind all the provisions of that contract.

Q. You know now, without looking at the contract, that you were not undertaking to warrant against any claims they might make, do you not?—A. I do not know that.

Q. You drew the contract?—A. I did.

Q. You spoke yesterday about this Robertson contract. Was that the one that was recorded?—A. Yes; the option from John M. Robertson to Mr. Williams.

Q. You say you did not record that?—A. I did not know anything about its being recorded.

Q. I understood you to say yesterday that it was acknowledged by the grantee, acknowledged by Mr. Williams, and put on record.—A. The grantor.

Q. By the grantee it was acknowledged?—A. I understood so.

Q. I presume the purpose of putting that acknowledgment on there was to get it recorded, was it?—A. It did get it recorded. I do not know the purpose.

Q. It is the rule there, the same as everywhere else, that a paper must either be sworn to or acknowledged in order to get it on record.—A. Papers have to be duly acknowledged by the grantor in order to get on record.

Q. Do you say it is limited to the grantor?—A. It is.

Q. Do you not think an acknowledgment by some one who saw the grantor sign the affidavit would put it on record?—A. Under some circumstances an affidavit may be made and record obtained.

Q. The purpose of recording it was just simply to preserve the contract or evidence of the contract, was it not?—A. As it stood it had absolutely no effect of that kind, if you wan that opinion as a matter of law.

Mr. WORTHINGTON. Mr. President, I object to a continuation of this inquiry about why a paper was recorded. It has already appeared that it was recorded by William P. Boland, and neither Judge Archbald nor Mr. Robertson, the grantor, knew anything about the matter. The manager is inquiring why it was recorded. The witness knows nothing of having it recorded, and how could he? The managers objected to what he knew of it and his mental operation, and now they ask his mental operation of William P. Boland, which I submit is very unfair to the witness.

Mr. Manager STERLING. To save time, I will withdraw the question.

Mr. CULBERSON. I desire to ask a general question of the judge.

The PRESIDENT pro tempore. The Senator from Texas presents a question which he wishes to propound to the witness. It will be read by the Secretary.

The Secretary read as follows:

Did it ever occur to you, in asking favors of railroad corporations as to culm dumps, where they might probably have cases before the Commerce Court, that you were putting yourself, as a member of the court, under obligations to the litigants before the court?

The WITNESS. I never consciously asked any favor of a railroad, either when I was a judge of the common pleas or a district judge or a Commerce Court judge. I did not understand, in endeavoring to make this deal, that I was asking a favor. I was simply presenting a matter to them as a business proposition. I expected them to treat it in that way, and I believe they did so.

Q. (By Mr. Manager STERLING.) Capt. May told you some time after the letter of March 31 that Richardson had been there, did he not?—A. I think he did over the telephone; yes.

Q. Did he not tell you on the street that he had been there?—A. I do not think he did.

Q. What did he say was the result of their conference?—A. I do not think he reported what was the result of the conference. I am sure he did not.

Q. Had he told you before that that he would have to see Mr. Richardson in regard to it?—A. He did.

Q. And after he had seen him, did you not ask him what the result was?—A. I presume I did; but I have no remembrance about it.

Q. Did he not tell you that Mr. Richardson was not disposed to part with the dump?—A. He never did.

Q. Did he tell you that he was disposed to part with it?—A. He never did.

Q. Did he never give you any satisfaction about it?—A. He never reported of the matter finally.

Q. Did you infer that Richardson was not disposed to sell it after May had seen him and when you found that May would not come to any conclusion about it?—A. I did not know that Capt. May had seen him. I had no inference about the matter.

Q. Did you not just say that he told you that Richardson had been to Scranton and that he had seen him about it?—A. No; I did not.

Q. Did he ever tell you that he had had a conference with Richardson about it?—A. He never did.

Q. Did you ask him if he had had the conference which he said he would have with him?—A. I do not remember that I did.

Q. Now, going back to the recording of this instrument, why, Judge, would not putting that instrument on record preserve the facts in the contract and be evidence of the contract?—A. That is a legal question, and I will take pleasure in answering it. Putting any document on record is simply to convey constructive notice. It has no effect to convey constructive notice unless it is, in the first place, a recordable instrument, and, in the next place, is put in such shape by acknowledgment or otherwise to be put on record. This contract never was put in legal shape to go on record, so that it was of no effect.

Q. I agree with you, Judge, that it was not constructive notice. That is not the question. But did it not serve to preserve the evidence of the contract in case the original had been lost?—A. It absolutely did not.

Q. Why?—A. Because the only way that it could do that would be by a certificate, and a certificate from the recorder of deeds of an unrecordable document would not amount to a piece of blotting paper.

Q. Could not persons who were familiar with the contract refer to the records to see what the contract provided——A. Not where——

Q. And parties who were familiar with it testify that it was a correct copy of the original contract, and in that way would it not preserve the evidence?—A. Absolutely not, unless it was a recordable contract and was prepared for record in accordance with the law.

Q. Would it not tell the same facts whether it was on record legally or illegally?—A. It would not convey the same legal constructive notice.

Q. No; it was not a notice, and I am not talking about a notice; but the facts that it contained would be just the same on the record whether it was recorded legally or illegally, would it not?—A. You are asking me for an opinion of the law, and I will give it. I say no.

Q. Is not that simply a question of fact, Judge?—A. Absolutely not; it is a question of law.

Q. Well, we will leave that. Your name was not in the option which May gave to Williams, was it?—A. It was not.

Q. You prepared the option from Robertson & Law to Williams?—A. From Mr. Robertson to Mr. Williams.

Q. And your name was in that, was it?—A. It was only there as a witness to Mr. Robertson's name.

Q. You were not a party to it at all?—A. Not in terms; no.

Q. In the papers, now, does your name appear in any of these transactions about the Katydid dump?—A. When I supposed we were going to make a sale to the Laurel Line—to Mr. Conn.

Q. That was after you had gotten the option?—A. After the option had been secured; yes.

Q. And when you first took it up with Conn, then, for the first time, you put your name in writings?—A. That was the first time that my name appeared.

Q. And after that was abandoned, then you ceased to put your name in the writings? You did not put it in the option to Mr. Thomas Star Jones, did you?—A. I did not put it in the option to Mr. Jones for the reasons which I have given.

Q. And your name was not in the Bradley contract?—A. I never had anything to do with the Bradley contract.

Q. I am not asking you about that. Do you know whether your name was in the Bradley contract?—A. I really do not know. I never saw that contract and never heard of it.

Q. You have seen a copy of it, have you not?—A. I have not.

Q. You heard it read before the Judiciary Committee, did you not?—A. I think I did.

Q. And you remember that your name was not in it?—A. I do not remember anything about it.

Q. Judge, do you know whether or not in these transactions from the 31st day of March for a year your name appeared in the contracts except in the letter you wrote to Mr. Conn and the contract to Conn?—A. I think that is true.

Q. Do you remember hearing Mr. Conn testify before the Judiciary Committee?—A. I heard his testimony there.

Q. Do you remember that he testified there never was any written contract submitted to him?—A. I believe he did.

Q. You were present there at that time?—A. I was.

Q. And had the contract with you?—A. I do not remember whether I had the contract with me at that time. I think I did not.

Q. You knew at the time that Mr. Conn was mistaken about it, did you not?—A. I knew it when I came to look up the matter; yes.

Q. Did you not know at the time that you had prepared the contract and that he was mistaken about it?—A. I knew I had prepared the contract; yes.

Q. Did you correct him about it?—A. Correct him before the Judiciary Committee?

Q. At any time, whether there or elsewhere?—A. Not before the Judiciary Committee, certainly.

Q. You did not correct him until about the time these proceedings had commenced in the Senate, did you?—A. Oh, yes; well——

Q. Then, you sent word to him there was a contract, and he asked you to let him see it?—A. I met him one day upon the street; we talked on this point, and I told him that he was mistaken; that I had the contract, and would show it to him.

Q. That was shortly before these proceedings in the Senate?—A. No; that was in the summer after these articles had been preferred and the impeachment had started.

Q. About what time was it in the summer?—A. I should say along in August or September.

Q. Judge, your first connection with the Marian Coal Co. proposition was when Watson came to you?—A. Yes.

Q. Refreshing your recollection, had you not had a talk with Watson before Watson had been employed by the Bolands——A. I had none——

Q. In which you suggested to him that he might get that work?—A. I do not know where you got that idea, because it is unfounded in any fact.

Q. You say, then, that he came to your office one day and told you that he had been employed by the Bolands?—A. He came to see me—I could not tell exactly where—and told me that he had been employed to try to settle the Marian Coal Co. case with the Delaware, Lackawanna & Western Railroad.

Q. Was not that in your office?—A. I presume it was; I do not remember.

Q. Do you remember what was said?—A. Nothing, except in just that general way at that conversation, and the further fact that he inquired whether I was acquainted, and how well I was acquainted, with Mr. Loomis, and asked me whether I would not see Mr. Loomis and tell him that if he would call Mr. Watson in the case he was authorized to effect a settlement.

Q. Who was Mr. Loomis?—A. Mr. Loomis was a gentleman who lived in Scranton, with whom I was personally and socially acquainted, and who was at the time I speak of vice president of the D. L. & W. Railroad, having offices in New York.

Q. Had he any other position with the railroads?—A. None but vice president that I know of.

Q. And the Delaware, Lackawanna & Western Railroad Co. was the company against whom the Bolands, or the Marian Coal Co., had a suit pending in the Interstate Commerce Commission?—A. Before the Interstate Commerce Commission; yes.

Q. You knew that at that time?—A. That was stated.

Q. And also the Delaware, Lackawanna & Western had two suits pending before the Commerce Court at that time?—A. I did not know it at that conversation. I did not know, in other words, that they were interested in what has been spoken of here as the Lighterage case. I do not remember whether they were or not.

Q. Did you not say in your answer to this article that you did know the fact that they had these cases pending in your court?—A. I do not remember what I say in my answer on that subject.

Q. When was it that Watson came to you?—A. As I have said to you just now, a day or two before I saw Mr. Loomis in New York.

Q. Well, I want the time as nearly as you can give it.—A. I saw Mr. Loomis in New York on the 4th of August, 1911.

Q. Had not Loomis been before the court arguing this very case shortly before that?—A. Mr. Loomis?

Q. Mr. Brownell, I mean.—A. Mr. Brownell never appeared before the Commerce Court except in one case.

Q. What case was that?—A. That was the Sugar Refinery or Lighterage case, which was disposed of in May.

Q. When did he argue it?—A. Why, I have my book here, I think. I am not sure whether I have it.

Q. You heard the argument?—A. I did.

Q. And it was in May?—A. It was in May.

Q. The Delaware, Lackawanna & Western was a party to that suit, was it not?—A. I do not remember that they were.

Q. Was it a party to No. 38?—A. I do not remember.

Q. Do you not know that the Delaware, Lackawanna & Western was a party both to Nos. 38 and 39?—A. You ask me for my memory, and I say I do not.

Q. Do you say now that it was not?—A. I do not; the record speaks for itself.

Q. Are you familiar with the answer which you made to this charge?—A. Well, I was familiar with it at the time I made it.

Q. Do you remember that you say in that answer that you knew that that railroad company had a suit pending in your

court?—A. I do not remember what I say upon that subject in my answer.

Q. And that it had been argued in your court already before that?—A. I do not remember what I say in my answer; it is there.

Q. You told Watson you would assist?—A. I did not speak to him in that way at all. He asked me to do this simple favor, which was simply to make a way for him. I told him that I would try to see Mr. Loomis, and I did.

Q. You went to his office in New York to see him?—A. I did.

Q. Had you seen him before that?—A. I saw him when he was in Scranton many times, but I never saw him upon this matter before that time.

Q. Why did you not speak to him in Scranton about it?—A. The first time I spoke to him in Scranton was about three weeks after——

Q. Why did you not speak to him when you saw him in Scranton without going to New York?—A. Why did I not speak to him?

Q. Yes; about this matter.—A. About this matter?

Q. Yes.—A. I had no occcasion to speak to him about this matter before Mr. Watson asked me.

Q. When did Mr. Watson come to you?—A. I said about a day or two before I saw Mr. Loomis in New York.

Q. And that was the 4th of August when you were in New York?—A. Yes.

Q. The same day that you saw Brownell and Richardson about the Katydid culm dump?—A. Yes.

Q. At the time Watson first spoke to you about it, do you say that Christy Boland was not present?—A. He was not.

Q. Do you say that he was not present at any time when Watson and you talked about the matter?—A. I do not remember his ever being present when Mr. Watson and I talked about the matter, and I am satisfied that I would remember it if he were, because I remember quite distinctly three or four times when Mr. Boland came there and shut the door and was very secretive in what he said.

Q. Let me refresh your recollection, Judge. When Watson was in your office talking about the settlement of this matter——A. You mean the first time?

Q. Any time. Did not Mr. Boland come in on account of a telephone call, or for any other reason, and did you not say to him then, "Now, I understand that you have employed Mr. Watson in this matter, that he is to dispose of this property and settle these suits for $100,000, and that his fee is to be $5,000"?—A. I do not remember Mr. Watson and Mr. Boland ever being together in my office. I never remember, of course, any such conversation as you suggest.

Q. When was it that Phillips came to your house?—A. I think the very last day that I was in Scranton before coming down here to attend the October session of the Commerce Court.

Q. He came to your house at your request?—A. Not at my request, as I remember, but by appointment.

Q. Well, you asked for the appointment, did you not?—A. I think, when I refresh my memory in this respect by what he himself has testified, that there was some telephone communication between him and me with regard to seeing him in the morning, which was Saturday, and he wanted to fix it in the afternoon. I told him that that was the time when I took my Saturday walk. It was then put over until evening, and he came to see me at my house.

Q. And you invited the conversation over the telephone, did you not—you called him up?—A. I do not remember whether I called him up or whether he called me up.

Q. Why would he call you up, Judge?—A. He would call me up only in case it had been suggested by Mr. Loomis or Mr. Reese or some officer of the company.

Q. Do you know whether that had happened?—A. I do not remember.

Q. Had Watson at that time seen you in regard to the matter?—A. As I say, he saw me just before I saw Mr. Loomis.

Q. Well, he came over there and you talked at some length about this matter?—A. Yes; when Mr. Phillips came there, you will remember, it was nearly two months after I had seen Mr. Loomis.

Q. It was just before you went to New York, then, when you saw Loomis?—A. You mean that I saw Mr. Phillips.

Q. Yes.—A. Oh, no; I do not see why you suggest that.

Q. I am not suggesting it; I am just asking you.—A. It certainly was not. As I say, I saw Mr. Loomis on the 4th of August, and the time that Mr. Phillips was at my house was on the 28th of September, along in the very last part of September.

Q. Had you written any letters to Loomis prior to the time Watson came over?—A. I do not recall the letters. They are in evidence, and I recall that I wrote those letters.

Q. How many letters did you write to Loomis?—A. I think I wrote two, or maybe I wrote three; I am not sure about that.

Q. Did you do that by reason of the fact that Watson came to you and asked you simply to speak to Loomis about it, so as to give him a favorable introduction?—A. No; that was by reason of what followed on that.

Q. When Phillips came to your house you talked at some length?—A. Well, Mr. Phillips did a good deal of the talking.

Q. And he told you about the situation?—A. Yes.

Q. And told you that Watson wanted $161,000 for the property?—A. No; he did not say that.

Q. What did he say?—A. As I remember, he mainly went over the troubles and difficulties that they had with the Marian Coal Co. and with Mr. W. P. Boland with regard to washing, cleaning, preparing, and shipping coal and with regard to the value of what there was left in the Marian washery and the dump.

Q. Well, you did talk about the great difference between the two parties to the settlement, did you not?—A. No; he suggested that there was a wide difference.

Q. Did he tell you what that difference was?—A. No; he only spoke about the little value that there was; so small a value, as he considered it, in the remains of the Marian washery that his company did not feel as though they could make any offer with regard to it.

Q. And you said yourself, then, to Mr. Phillips, that the parties were very far apart and it did not look hopeful, did you not?—A. No; I do not think I said that; I do not remember that I said that.

Q. Do you remember hearing Mr. Phillips testify to that?—A. No; I do not remember hearing him testify to that.

Q. Did you make any remark of that kind?—A. I would not say that I did not.

Q. You knew at that time that Watson had presented a proposition of $161,000?—A. I remembered that Mr. Watson had mentioned that amount.

Q. Did you understand that that was what he demanded of the railroad company?—A. I understood that that was the claim that he was retained to present.

Q. So you knew, then, after the talk with Mr. Phillips, what the difference between the parties was, did you not?—A. I knew that there was a wide difference; yes.

Q. When did Watson first tell you that that claim was for $161,000?—A. Well, I can not tell you whether it was the very first time—I do not think it was—I think it was at some interview which I can not specifically fix.

Q. How is that?—A. I can not specifically fix the time when he said that.

Q. It was on September 27 that Loomis wrote you that he found there was very little, if any, prospect of reaching a settlement in the case owing to the great difference of opinion as to the merits of Mr. Boland's claim. Then you answered the next day, did you not?—A. If my letters are there I did; I do not remember the date.

Q. It is dated September 28, and says:

MY DEAR MR. LOOMIS: I am very sorry to have your letter stating that you have not been able to effect a settlement with Mr. Boland. I trust, however, that the matter is still not beyond remedy. And if I thought that it would help to secure an adjustment, I would offer my direct services.

Do you remember writing that letter?—A. I wrote that letter.

Q. And that is, after you knew, after Watson had told you, that the claim was for $161,000?—A. That certainly is. It was also after Mr. Boland had seen me two or three times and importuned me to see whether something could not be done about the matter.

Q. Judge, why did you put that in your answer?—A. Why did I put what in?

Q. Why did you tell about the Bolands being to see you? Did I ask you anything about that? Did you understand my question to call for any answer about the Bolands?—A. Well, I answered it in that way.

Q. Why did you do so?—A. Because I wanted that fact brought out.

Q. Because you want to impress Senators with the idea that the Bolands were trying to impose on you, or something of that kind; was that it?—A. I do not put it in that way; I want to give them the facts.

Q. I shall insist, Judge, that you confine your answers to my questions.—A. I will try to do so.

Q. Then, after that, you wrote as follows:

MY DEAR MR. LOOMIS: I understand that there has been a suggestion that Mr. Watson meet you and possibly also Mr. Truesdale, and that Mr. Watson has written asking for an appointment. It seems to me, if I may be permitted to say so, that this is a very good idea. It will give you an opportunity to discuss the Boland claim with Mr. Wat-

son upon a somewhat different basis than Col. Phillips could, representing the coal department.

I have little doubt but that it will appear so to you, and it may be altogether unnecessary for me to write about it. But I am sure you will not take it amiss to have me do so, and I shall hope that a settlement may yet be reached in that way. There is nothing like a personal interview to bring about such a result.

Yours, very truly, R. W. ARCHBALD.

That letter is dated October 3. That letter did bring a personal interview, did it not?—A. I understood it did.

Q. It got Truesdale and Loomis and Phillips and Reese, all officials of this company, together in Scranton to talk over the matter with Mr. Watson, did it not?—A. I do not know about that. I was not present. I was here in Washington when that letter was written.

Q. You did know that they had a conference?—A. I have heard in the course of this proceeding that there was a conference at that time.

Q. Who was Mr. Truesdale?—A. Mr. Truesdale has been here on the stand. He is president of the Delaware, Lackawanna & Western Railroad.

Q. And Mr. Loomis is vice president?—A. I think so.

Q. And Mr. Phillips is superintendent of the coal property?—A. General manager of the coal company.

Q. And what is Mr. Reese's position?—A. I think Mr. Reese is local attorney.

Q. That conference occurred on the 5th of October, did it not?—A. I do not know; I was here; I was not in Scranton.

Q. You were in Washington?—A. I was.

Q. On the 6th you got a telegram from Watson, did you not?—A. I think it was the 6th.

Q. Asking you when he could meet you in Washington, and you wired back "almost any time"?—A. Yes.

Q. Did he wire you to meet him at the Raleigh Hotel?—A. He wired that he would be at the Raleigh.

Q. And he got here on the 7th?—A. He got here on Saturday, the 7th; yes.

Q. He told you, did he not, that he had had this conference?—A. I do not remember whether he told me, but I presume very likely he did. I do not see how we could be together without his saying that.

Q. Why did he come to see you after the conference in which these railroad officials had told him that there was no object in carrying on negotiations any further?

Mr. WORTHINGTON. That is another question, Mr. President, involving what was in the mind of some one else. You can ask what he said.

Mr. Manager STERLING. I will put it in this form: What reason did Watson give you for coming to Washington to see you after the conference with the railroad officials?—A. Mr. Watson told me that the Bolands were not content unless he came down here to see me to ascertain whether anything further could be done.

Q. What did you tell him about it?—A. I told him I did not see what could be done further.

Q. You went to the Raleigh Hotel?—A. I did.

Q. And you were standing on the sidewalk in front of the hotel waiting when he came?—A. No; I was in the lobby, I think. My remembrance is that I was in the lobby.

Q. Is Watson mistaken about that?—A. I would not undertake to say whether he is mistaken about it. I am just giving you my memory.

Q. Do you remember what his testimony was?—A. I do not.

Q. It was that you were waiting outside; that he came there to see you; and that you went together to the Commerce Court building?—A. My remembrance about it is this way——

Q. Wait. Do you remember Watson's testimony to that effect?—A. I do not.

Q. Now, refreshing your recollection in that way, is not that the fact about it, Judge?—A. It is not. The fact, as I remember it, is that it was a very cold, stormy day. He came in about half past 1. I went down there and sat in the lobby of the Raleigh, and waited until he came in.

Q. Did he tell you what had been said at the conference?—A. I have not any memory about the matter.

Q. Did he tell you who was present?—A. I do not remember that he told me anything about it. I only say that I assume that he must have done so.

Q. But you have no recollection of what he said?—A. I have not.

Q. Why is it, Judge, that your recollection about that incident and about the question as to whether or not Christy Boland talked to you about the $100,000 is not clear, when it is so very clear in regard to some other things? Do you know?—A. If you will give me the philosophy of life I will tell you why people can remember some things and some things they can not.

Q. It is true, Judge, that people remember the more important incidents of a transaction rather than the trivial ones, do they not?—A. They remember more clearly where they are themselves interested in matters than where they are simply interested for others.

Q. Who owned Packer No. 3, Judge?—A. I understood that it belonged to the Girard estate in one sense, but was under lease to the Lehigh Coal Co., or covered at least by a lease which runs out this year.

Q. And the Lehigh Coal Co. is a subsidiary of the Lehigh Valley Railroad Co.?—A. I have always understood that there was a close connection between the two.

Q. What official position does Mr. Warriner hold in those corporations?—A. Mr. Warriner at that time, as I understood, was general superintendent of the coal company.

Q. And where was his place of business?—A. In Wilkes-Barre.

Q. How far is that from Scranton?—A. About 20 miles.

Q. You went to see Warriner, did you not, in behalf of Packer No. 3?—A. For the purpose of endeavoring to secure Packer No. 3.

Q. At that time you and one of the Joneses and some other gentlemen were about to organize a corporation to handle that property?—A. If we secured that lease we expected to organize a company to wash the dump.

Q. Do you remember the capital stock of the corporation?—A. I think it was to be $25,000.

Q. Was any of it to be paid in?—A. The money for that purpose was to be obtained——

Q. Just answer my question.—A. I could not tell you. We would pay it in if it was necessary.

Q. You expected to get the money from Mr. Farrell, of New York?—A. That was the arrangement.

Q. Mr. Jones had told you he could get it in that way?—A. I think I had seen Mr. Farrell myself. I know I did see him before the matter was consummated.

Q. At the time you planned this it was not the purpose of the stockholders or organizers of this company to put up any money?—A. We would not put up any money unless we had to.

Q. Well, what did Mr. Warriner tell you?—A. About leasing that property?

Q. Yes.—A. He said he thought the company would be willing to lease the property.

Q. He told you on what terms?—A. He spoke of the terms.

Q. And you went back and reported to your associates, did you not?—A. I did.

Q. And then you had a conference with Mr. Farrell, of New York?—A. I think this conference with Mr. Farrell occurred after that; yes.

Q. In which he agreed to put up all the money necessary to operate the dump?—A. To put up enough to build the washery.

Q. To put up $25,000?—A. Yes; fully that.

Q. And he was to get a certain per cent of the profits, besides his interest and his principal back?—A. He was to get a quarter of the profits, and be secured by a mortgage upon the lease and the property, the washery, whatever it was.

Q. For his principal and interest?—A. Yes; for his principal and interest, and to get back the principal and interest at so much a ton.

Q. What interest were you to have in the profits?—A. The interests were divided around. Mr. Bell and Mr. Petersen were invited in. They were associated together in other matters, and they were given a certain interest. Mr. Jones told me he was obligated to Mr. Hellbut to a certain extent and also to Mr. Howell Harris, and they were given certain interests, and after deducting those interests what was left was divided between Mr. Jones and myself.

Q. How much was that?—A. I do not know whether I can remember the different things. I think 25 or 26 per cent; that is to say, Mr. Jones and I were to get a quarter of what the company got.

Q. Was not the stock to be divided equally between you and seven or eight other gentlemen?—A. Oh, no.

Q. Anyway, you and Mr. Jones were to get a fourth or a little over a fourth?—A. Not a fourth of the profits of actually washing the dump, because a quarter of that was to go to Mr. Farrell.

Q. You were to get a fourth of the balance?—A. About a fourth of the balance; yes.

Q. Why were you to have any interest in that stock?—A. Why not?

Q. Well, why not, after you had gone to see Mr. Warriner; is that your idea?—A. I see no reason why, after organizing that company, that enterprise, I was not entitled to a share. It would be very strange if I did not have a share.

Q. Why?—A. Because I was instrumental in part in organizing the company—getting it up. It was in part my scheme and part Mr. Jones's.

Q. And instrumental in acquiring the property?—A. To a certain extent; yes.

Q. Was it not entirely due to you that you acquired this property from Mr. Warriner?—A. I do not think so.

Q. Did anybody else than you see Mr. Warriner?—A. No; I saw Mr. Warriner. But the property was not obtained alone from Mr. Warriner.

Q. Who else did it come from?—A. The main thing had to be arranged with the Girard estate.

Q. Who arranged that?—A. I endeavored to, and did in part with my nephew.

Q. And you did all that was done in reference to acquiring the property, both from Mr. Warriner, of the Lehigh Valley, and the Girard estate?—A. I did, except so far as an application was jointly made by myself and my associates to the Girard estate.

Q. And who made it?—A. I drew up that form.

Q. And all of you signed it?—A. They all signed it.

Q. So all that anybody, except yourself, did with reference to getting this property from the Lehigh Co. was simply your associates signing the application which you had drawn after you had been to see the Girard estate and after you had seen the Lehigh Valley people?—A. The application was made to the Girard estate——

Q. Answer my question.—A. I do not think I can.

Mr. Manager STERLING. Let the question be read.

The Reporter read the question.

The WITNESS. All that was done in regard to the acquisition of it directly was done by me.

Q. (By Mr. Manager STERLING.) And it was as a consideration for your services in getting this property from the Lehigh people that they gave you a one-half interest in one-fourth of the profits?—A. That is not so.

Q. Well, what other reason was there?—A. The matter was arranged between Mr. Jones and me, and it was Mr. Jones and myself that determined what interest Mr. Peterson and Mr. Bell should have and what interest should be given to Mr. Hellbut and Mr. Howell Harris.

Q. Then I will put it this way: You kept such interest as you did keep and it was conceded to you by Mr. Jones by reason of the fact that you had seen Mr. Warriner about getting the Lehigh Valley Co.'s interest?—A. That is not so either.

Q. What is your idea about it?—A. Mr. Jones and I talked, of course, about the organization of this concern, and the obtaining of the dump, and we had to make a practicable concern. We had to have somebody to operate it, like Mr. Petersen, and somebody who could assist in the organization and in the carrying on, like Mr. Bell, so we arranged with them to come into the company so that we might have a suitable organization.

Q. You gave them an interest because you would have somebody in the company who could operate it?—A. Yes.

Q. You got into it because they wanted somebody who could go to the railroad companies. Now, is not that the long and short of it?—A. No; it is not. I did not get into it. They are the ones that got in.

Q. Anyhow you did perform that part of the service?—A. I certainly did.

Q. You never did put up any money, did you?—A. The matter has never been disposed of.

Q. Why did you not finally close up that deal, Judge?—A. Because the Girard estate had never arranged for the lease, the renewal of the lease, which expires this year. They were not willing, I am informed, to make any arrangement with anyone outside until that had been determined.

Q. Let us go to the Warnke case. As I understand it, Mr. Warnke was operating a dump under a lease from some railroad company. What railroad company was that?—A. He was not operating a dump——

Q. He had been——A. (Continuing.) From any railroad, as I remember it.

Q. He had been. What dump had he been operating?—A. I can tell you only in the vaguest way, because I have never seen the property and only know what he said. I will give you what he said.

Q. Well, put it in that way, Judge. Just so I have your information on the subject.—A. I understood from him that about two years before that he had been operating under a lease. I think that lease was to a man by the name of Baer Snyder, and that he had taken an assignment from this party, and, among other things, that included underground workings and also a washery.

Q. But the lease was made by the Philadelphia & Reading Coal & Iron Co., was it not?—A. To whom?

Q. To the gentleman who assigned it to Mr. Warnke.—A. I do not know. I know that ultimately the Philadelphia & Reading Coal & Iron Co. had control of the situation.

Q. And that company is a subsidiary of the Philadelphia & Reading Railroad Co.?—A. I have always understood so.

Q. There is another company by the name of the Reading Co., which owns all the stock of both of those corporations?—A. I know nothing about that.

Q. Whom did you go to in the interest of Warnke?—A. I went to Mr. Richards.

Q. Who is Mr. Richards?—A. Mr. Richards, I think, is general manager or vice president, or something or other, of the Philadelphia & Reading Coal & Iron Co., he having charge of their operations in Schuylkill County.

Q. And you went to him because Mr. Warnke had been operating under a lease which had been made and which had been assigned to Mr. Warnke?—A. Yes.

Q. By the original lessee?—A. Yes.

Q. Where did Mr. Richards live?—A. At Pottsville, Pa.

Q. That was 80 miles from Scranton?—A. About that.

Q. And you went up there to see him after you had made an appointment with him over the phone or by letter?—A. I went primarily to Pottsville to see my nephew with regard to the leasing of Packer No. 3, and in that connection I arranged with Mr. Richards to see him upon that visit.

Q. On the day when you went to Pottsville, 80 miles from Scranton, you had two coal-dump deals on hand, had you?—A. If you want to put it that way—oh, no; I did not have any coal-dump deal with Richards.

Q. It related to Packer No. 3, did it not?—A. With Mr. Richards?

Q. No; with your nephew.—A. Yes; that. But I did not have two culm-dump deals on my hands.

Q. What was the character of the transaction with Mr. Richards? It related to a culm dump, did it not?—A. Simply to see whether he would not reconsider the decision he had made with regard to Warnke.

Q. It was with reference to a culm dump, was it not?—A. Yes.

Q. And Mr. Warnke told you that if you did not succeed in getting him to continue the lease, to see if you could get the Lincoln dump?—A. Yes.

Q. And Mr. Richards told you he would not reconsider?—A. Yes.

Q. And they had given their final answer to Warnke?—A. He brought a bunch of papers, quite a bundle of papers——

Q. Just answer my question, please.—A. Yes; you are right.

Q. Then you went home and told Mr. Warnke the result of your trip?—A. Yes.

Q. And suggested to him that you could get him a dump belonging to the Lacoe & Shiffer Co. on the Delaware & Hudson?—A. No; absolutely not. There is not a particle of fact in either of those statements.

Q. Did you not suggest that to him at any time?—A. I did not.

Q. Who did?—A. The only suggestion that was made and the only way that Warnke came in in connection with that was that Mr. John Henry Jones tried to sell that at first to the Central Brewing Co., and the Central Brewing Co. sent Warnke there to see the dump and pronounce upon it.

Q. How did he come in connection with you in regard to the matter?—A. The Central Brewing Co. would not buy it.

Q. Well, that had not anything to do with his coming to you about it. How did he come to come to you about it, or did you go to him?—A. With regard to that fill?

Q. Yes.—A. Because I had these letters and options with Mr. Berry with regard to it, and had the disposition of it practically.

Q. Can you answer the question as to how you and Warnke came to meet with reference to the gravity fill; did he come to you or did you go to him?—A. Mr. Warnke came to see me about that.

Q. How did he learn that you had it?—A. Through Mr. John Henry Jones.

Q. And that was after you had failed to get the Lincoln dump?—A. Well, I do not remember whether it was or not.

Q. What is your best recollection about that?—A. I could not tell you about that.

Q. It was not until after he found he could not get the Lincoln dump or a continuance of his lease with the Reading people——A. I would not be sure of that.

Q. That he undertook to buy the Lacoe & Shiffer dump, was it?—A. I would not be sure about that. It may be so.

Q. Anyhow, he bought the Lacoe & Shiffer dump?—A. No; he did not.

Q. Well, his company, the Premier Coal Co.—A. The company which was organized. He got Mr. Swingle and his brother-in-law, and Mr.——

Q. Judge, the Premier Coal Co. bought it?—A. The Premier Coal Co. bought the fill.

Q. And Mr. Warnke carried on the negotiations with you?—A. He did not.

Q. Did he not come to see you about it?—A. He did.

Q. What was said and done?—A. He suggested that he would like to buy that dump. He knew what the price was as stated; I think at that time Mr. Berry had offered to dispose of the dump for $6,000 cash. Mr. Warnke could not raise that amount. He had $2,000. He wanted to make an arrangement by which the $2,000 would be accepted and the balance paid by a royalty arrangement.

Q. Why did he come to you in regard to it?—A. As I say, he knew that I had the arrangement with Mr. Berry in regard to the disposition of it.

Q. Is it not true that at that time your option from Mr. Berry had expired?—A. The written option, yes; but not the verbal arrangement with him.

Q. You remember Mr. Berry testified the other day that at that time the option had expired?—A. I heard his testimony.

Q. Was not that true?—A. It is not true. I made the arrangement finally by which the parties were brought together.

Q. Yes; finally; but under your option agreement with Mr. Berry, who had the matter in charge, they were not bound to let you have it at that time?—A. That is very true.

Q. That is true?—A. Yes; that is very true.

Q. Anyhow, they bought this Lacoe-Shiffer dump?—A. Yes; the Premier Coal Co. did.

Q. And after that they gave you a note for $510; after you had been up to see Mr. Richards at Pottsville, and after you had talked with Mr. Warnke about the gravity fill, then it was they gave you this note for $510, was it not?—A. In matter of time, yes; but there was no connection at all between them.

Q. I am not asking you about that.—A. But you put that in your question, and I do not propose to answer the question that way.

Q. Well, we will see. Was it after you had been to Pottsville to see Mr. Richards, and after your transaction with Mr. Warnke in reference to the Lacoe & Shiffer dump, called the old gravity fill, that they gave you this note?—A. In the matter of time, yes.

Q. That is all the question relates to—the matter of time.—A. I do not so understand the question.

Q. And you went to the office to get the note?—A. The note was sent to me at my office.

Q. Why did you go to get it?—A. The note, when first drawn, was not correctly drawn. It was drawn to my order instead of the order of the parties that were to indorse it.

Q. You mean the note was made payable to you or order.—A. It was made payable to my order. It did not have their indorsement.

Q. They signed it, did they not?—A. They signed it after my indorsement. That would not make bankable paper—not with us.

Q. So you objected to that note because it was made payable to your order?—A. Yes; because it was not made properly.

Q. Legally it was a good note?—A. Legally it was a good note; yes; but it made me the first indorser instead of them being ahead of me on the note.

Q. So you had it made out to the company and signed by them?—A. I had it made out to these individuals of the company who were to be the indorsers.

Q. And signed by them?—A. And they indorsed it.

Q. Then you indorsed it and got the money?—A. I negotiated it at my bank.

Q. How many times did you go to their office to get this?—A. Once.

Q. Did you not go twice?—A. I do not think I did.

Q. Did you not ask for the money the first time?—A. No; I had a talk over the telephone and it was arranged that they would give a note.

Q. Do you remember the testimony of Mr. Kiser?—A. I do not remember the testimony of Mr. Kiser.

Q. Do you think he is mistaken about your having come there twice?—A. I will pronounce judgment upon whether he is mistaken or not.

Q. You did not invest any money in any of these schemes, did you?—A. I do not know what schemes you refer to.

Q. I will say the old gravity fill. Did you have any investment in that?—A. I invested no money in that.

Q. You did not have to put up any money with Mr. Berry in order to get the option?—A. I did not.

Q. And he simply gave you a certain length of time within which you could say whether you would take it or not?—A. He gave me an option, which has been put in evidence.

Q. And if you could sell it at a profit within that time you would take it, and if not you did not intend to take it?—A. That is right.

Q. In any of these transactions did you engage in a contract whereby you were bound to pay any money?—A. I do not know that I did. I certainly would have to pay money to secure the rights of the Hillside Coal & Iron Co. in the Katydid dump and also to Mr. Robertson to get anything out of it.

Q. Not until after you had sold it?—A. Not until after we had sold the property.

Q. And not until after you had found a buyer did you expect to put up any money?—A. We hoped to find a buyer.

Q. And thought you had found one?—A. We did.

Q. What is your financial condition?—A. I have been a judge for 28 years, and my financial condition is not the best.

Q. Have you property outside of your home property in Scranton?—A. I have not. Oh, I have some little property outside of that.

Q. You testified yesterday about the correspondence you had with Mr. Helm Bruce?—A. Yes, sir.

Q. I wish you would state briefly what it was that inspired you to write the first letter to Mr. Helm Bruce.—A. As I explained yesterday, the first letter was written when I was formulating a dissenting opinion. May I have my papers there? [After examination of papers.] The consultation of the Commerce Court with regard to that case I find entered on my notes. I keep notebooks of arguments. I also keep a memorandum of the way cases are to be decided. I hold in my hands the notes of that case. At our consultation on that case on the 27th of May, 1911, a conclusion was reached in favor of the defendant. Judge Knapp was to write the opinion, and I expressed a dissent. I addressed myself to formulating a dissent and wrote up a dissenting opinion, as the manuscript of the opinion which I have here in my hand will show. That was done in September following. It was while I was examining the case for the purpose of expressing my dissenting opinion that I wrote to Mr. Helm Bruce with regard to Mr. Compton's testimony.

Q. Asking him to make the explanation?—A. Yes.

Q. Which he did by way of a letter?—A. Yes.

Q. Now, as I understand it, you did not send a copy of that letter to any of the counsel on the other side of the case?—A. No; I did not.

Q. And you did not converse with any of the other members of the court about it?—A. I did not.

Q. Did it not occur to you, Judge, that it would be appropriate for you to send to counsel on the other side of the case a copy of the letter you sent to Mr. Bruce?—A. As I say, I was writing a dissenting opinion. It did not call for any argument, and was only what you might say a very inconsiderable matter in the course of the case.

Q. Just answer my question. Did it occur to you——A. Please have it read.

Q. Did it occur to you that it would be appropriate for you to send copies to counsel for the other side?—A. It did not or I would have written them.

Q. You got an answer from Mr. Bruce?—A. I did.

Q. Which sustained your views on the point?—A. Yes.

Q. Then you wrote him again?—A. Yes.

Q. On August 26? What inspired that letter?—A. On what date?

Q. August 26.—A. I do not remember any letter of that date.

Q. I will read it:

AUGUST 26, 1911.

MY DEAR MR. BRUCE: I thank you for your letter of August 24 with reference to Mr. Compton's testimony, about which I wrote you.

You are not disputing that letter?—A. No.

Q. And then you got another letter, did you not, and after that, on January 10, you wrote to Mr. Bruce again—A. Yes.

Q. And you wrote from Indian River, Fla., did you not?—A. Yes.

Q. What inspired that letter? You had already acknowledged receipt of Mr. Bruce's letter.—A. That was to meet a question which had been raised by Judge Mack with regard to the disposition of that case. When we met together in October—when the Commerce Court met together in October—we had a further consultation over the case, and, according to my memorandum here, that occurred on October 21, and upon that we reversed the former conclusion of the court and were all agreed that the plaintiff was entitled to a decree, except Judge Mack. The case was then decided, virtually decided, so far as our consultation was concerned, so far as the agreement of the court was

concerned, upon that date. It was on January 10 I wrote this letter, after our consultation, which was purely a matter of settling the form of the opinion.

Q. So, when you wrote the first letter, you were engaged in writing a dissenting opinion. Do I understand you correctly?—A. Yes, sir.

Q. And afterwards the court reversed itself and came to your view of the case?—A. All except Judge Mack.

Q. Did the argument which you adduced by reason of your correspondence with Mr. Bruce have anything to do with changing the minds of the other judges?—A. It was not communicated to them, and so it could not have had any effect.

Q. No; the letter was not communicated to them, but did you present to the court the facts which you had gotten through the letter?—A. I do not remember that I did.

Q. Did you not make use of the information you got——A. Not at all.

Q. In the consideration of the case?—A. If I could——

Q. Just answer the question.—A. No.

Q. Anyhow, the court afterwards came to your view of the case?—A. Yes.

Mr. POMERENE. I submit the following question.

The PRESIDENT pro tempore. The Senator from Ohio submits a question. It will be read.

The Secretary read as follows:

Do you regard it as good practice to communicate with counsel on one side of a case, either on an issue of fact or of law, without advising opposing counsel?

The WITNESS. I certainly do not. That has not been my practice. I would not defend or attempt to defend any such practice as that.

Mr. JONES. I desire to submit two questions.

The PRESIDENT pro tempore. The Senator from Washington submits two questions to be propounded to the witness, which will be so propounded in the order in which they are numbered.

The Secretary read as follows:

You expected to submit your dissenting opinion to the other members of the court, did you not?

The WITNESS. I did submit my opinion. I sent it in advance to the other judges, a copy to each one, prior to our coming together in October following the date of the opinion.

The Secretary read as follows:

If you answer that you did, did it not occur to you that you should show your associates the letters you had received; and if not, why not?

The WITNESS. There was only one letter that had been received at that time with regard to what is really a very inconsiderable part of the opinion, and, as the opinion itself shows, what is stated in Mr. Bruce's letter with regard to Mr. Compton's testimony does not enter into the decision of the case at all, because it is assumed in the opinion that, contrary to what is stated in Mr. Bruce's letter, the statement of Mr. Compton, the witness, was exactly the other way. I could show that in two minutes by this opinion itself. And that part of the opinion was written by Judge Knapp.

Q. Now you are speaking of the first letter with reference to Compton's testimony.—A. Yes.

Q. But you have not stated, Judge, what inspired the second letter to Helm Bruce.—A. The ideas that had been advanced by Judge Mack in consultation in regard to the question of variations from what was known as the Cooley award I would very much like to go into if the Senate had patience to listen.

Q. I just want the facts in the case. Did you send a copy of that second letter to Mr. Bruce to counsel on the other side of the case?—A. I did not.

Q. Did it occur to you that it would be a very proper thing for you to do at that time?—A. No; or I would have done it.

Q. Judge, you say it is not your practice to write counsel on one side without giving notice to the other. Why did you make an exception in this case, if that has been your general practice?—A. We were simply at that time engaged in settling the form of the opinion. We had decided how we would dispose of the case, and it was simply with regard to this incidental matter in the course of the opinion.

Q. Judge, in reply to that second letter you got an additional argument from Helm Bruce, did you not?—A. I got a letter.

Q. And it consisted of two pages and a half of finely printed matter in the proceedings of the Senate. That is what you got in reply?—A. Yes; I believe it does.

Q. And it is an argument in the case, is it not?—A. It is an argument.

Q. Did you submit a copy of that to the counsel on the other side, so that they might answer it?—A. I have already said not.

Q. Then after you had received that you wrote:

MY DEAR MR. BRUCE: I thank you for your letter and its kind appreciation of the opinion of the court in the New Orleans Board of Trade case; but you fail to take credit for the very important part which you played in the result. Frankly, the case was won on your argument and brief. Your oral argument was one of the best that we have heard, and your brief was an absolute demonstration of the errors committed by the commission and complete at every point. You can not fail to note how closely the opinion follows and reflects what is there said.

Now, Judge, do you not think that this correspondence that you had with Bruce had its effect upon your mind, and consequently upon the court, and that it was absolutely unfair to the other side of the case for you to carry on that correspondence in the way you did?—A. I certainly do not. What is spoken of in that letter——

Q. That is all I asked for; just that.—A. You have read the letter and you have endeavored to put into the question you put things that the letter does not apply to at all. That letter you have last read has nothing to do with this letter of January 10. It refers——

Q. I read the letter correctly so far as I read it, did I not?—A. You read it correctly; yes.

Mr. CULBERSON. Mr. President, I send a question to the desk.

The PRESIDENT pro tempore. The Senator from Texas propounds an inquiry, which will be read by the Secretary.

The Secretary read as follows:

In one of the letters to Mr. Bruce you referred to a proposed conference with him in which you would explain to him the causes of delay in deciding the case. What was the proposed explanation?

The WITNESS. That is, why was the case delayed the way it was? Do I understand that that is the question?

Mr. CULBERSON. Let the question be read again, Mr. President.

The WITNESS. I want to understand the question.

The PRESIDENT pro tempore. The question will be again read.

The Secretary read as follows:

In one of the letters to Mr. Bruce you referred to a proposed conference with him in which you would explain to him the causes of delay in deciding the case. What was the proposed explanation?

Mr. CULBERSON. If I may do so, I will ask that that letter be read in this connection.

Mr. WORTHINGTON. That is what I was going to suggest.

Mr. Manager STERLING. Which letter is that?

Mr. WORTHINGTON. The letter that Judge Archbald wrote, on page 624.

The PRESIDENT pro tempore. That letter has already been read.

Mr. WORTHINGTON. The first part of it was read and the part to which the Senator refers is the second paragraph.

Mr. Manager STERLING. I suggest that the whole letter be read.

The PRESIDENT pro tempore. The whole letter will be read.

The Secretary read as follows:

[U. S. S. Exhibit 61.]

(R. W. Archbald, judge, United States Commerce Court, Washington.)

SCRANTON PA., *March 8, 1912.*

Mr. CULBERSON. That was not the letter. I wish to have the letter to Mr. Bruce read.

Mr. Manager STERLING. It is a long letter.

Mr. CULBERSON. It is the letter from Judge Archbald to Mr. Bruce in which he says that he proposes to have a conference with him and give him an account of the delay in the decision of the case pending before the Commerce Court.

The PRESIDENT pro tempore. The letter will be identified and then read.

Mr. WORTHINGTON. This is the letter.

Mr. CULBERSON. That is all right, then.

Mr. WORTHINGTON. It is the letter. The misunderstanding arises from the fact that there appears at the top of the letter, "R. W. Archbald, judge, United States Commerce Court, Washington," and the Senator evidently thought it was not the letter.

Mr. Manager NORRIS. That is a part of the letterhead.

Mr. CULBERSON. Let the whole letter, then, be read.

The Secretary read as follows:

SCRANTON, PA., *March 8, 1912.*

MY DEAR MR. BRUCE: I thank you for your letter and its kind appreciation of the opinion of the court in the New Orleans Board of Trade case; but you fail to take credit for the very important part which you played in the result. Frankly, the case was won on your argument and brief. Your oral argument was one of the best that we have heard, and your brief was an absolute demonstration of the errors committed by the commission and complete at every point. You can not fail to note how closely the opinion follows and reflects what is there said.

As for myself, I am only entitled at the most to a part of the opinion as filed. A considerable portion of it, if not indeed the best, is from the hand of another member of the court, and it is probably there that you find the enunciation of principles which you particularly com-

mend. I regret exceedingly the delay which has occurred in this case; but some time, when I have the pleasure of seeing you again, I will endeavor to explain how it came about.

Very truly, yours, R. W. ARCHBALD.

Mr. CULBERSON. That is what I want an explanation of.

The WITNESS. I did not intend in that letter to suggest that there would be a proposed conference, using that term. I expected and hoped some time in the future to meet him, and then I would endeavor to explain the delay which had occurred in filing that opinion, which was not attributable to myself. The rest of the letter was in response to the kind things he had said about the opinion, attributing it to my hand, and I endeavored to respond in kind with regard to his brief.

Mr. CULBERSON. I should like to have the question again asked and answered.

The PRESIDENT pro tempore. The Secretary will again read the question.

Mr. CULBERSON. I want the explanation of the delay which was supposed to have been made.

The WITNESS. Very well, I will answer that direct now, if I may. The delay was not due to myself. The delay was due to the endeavor to get the court to harmonize its views as nearly as possible, and with the hope that eventually we might get together upon that. The case was virtually decided when we met in consultation on October 21, and, so far as I was concerned, I was ready to have an opinion filed at that time. Very shortly after that time, so far as I was concerned, the opinion was complete, but it was left to the president of the court to make some changes, which it was supposed would reconcile some differences of views. Therefore a great many things were taken out of my opinion and some others were put in, until it arrived at the form in which it was filed, but none of that delay, as I conceived, was due to myself.

Mr. NELSON. I submit the following question.

The PRESIDENT pro tempore. The Senator from Minnesota propounds a question to the witness, which will be submitted to him by the Secretary.

The Secretary read as follows:

Was the opinion you prepared in favor of Mr. Bruce's clients in the case?

The WITNESS. The dissenting opinion, which is the basis of the opinion as now filed, was in favor of Mr. Bruce's client, the Louisville & Nashville Railroad, and that was the decision which was finally made.

Mr. CULBERSON. Mr. President, I wish to ask another question in this connection.

Mr. Manager STERLING. On that point—that is, the final opinion of the court——

The PRESIDENT pro tempore. The Senator from Texas will withhold the question for a moment?

Mr. CULBERSON. Certainly.

Q. (By Mr. Manager STERLING.) In connection with this I understand now the opinion which was finally rendered in the case was in favor of the railway company that was represented by Mr. Bruce?—A. Yes; that is true.

Q. And it supported the contentions of that side of the case all through?—A. No; not all the contentions.

Q. Practically; the main points?—A. The controlling points; yes.

The PRESIDENT pro tempore. The Senator from Texas propounds a question which will be submitted to the witness by the Secretary.

The Secretary read as follows:

Did you think it proper to explain privately to counsel in a case the difference between the members of the court?

The WITNESS. No; I should not. I never had met Mr. Bruce with regard to the matter since that time. I never have had the opportunity to talk over the matter, and I certainly would not go so far as to betray any of the confidences of the consultation room. I simply would have stated what I state here, that, so far as I was concerned, the delay was not due to myself.

Q. (By Mr. Manager STERLING.) Judge, the first opinion prepared by the court—agreed to by the court, excepting yourself—was against Bruce's client, was it not?—A. There was no opinion prepared.

Q. Well, the views of the court?—A. In our consultation, in May, the views of the court were against Mr. Bruce's client, the Louisville & Nashville Railroad.

Q. To whom was the duty assigned of writing the opinion?—A. Judge Knapp.

Q Did he write it?—A. He did not.

Q. But before it was written this correspondence took place?—A. The first correspondence, yes; the letter along in, I think, August or September of 1911.

Q. And was it not due to the suggestions which you made, and which you got from the argument and letters of Mr. Bruce, that caused the court to take it up for further consideration, which resulted in reversing the former opinion of the court?—A. No; that is absolutely not so, for, as I wanted to point out, and have endeavored to point out, it is assumed in the opinion that exactly what was contended on the part of the Interstate Commerce Commission with regard to Mr. Compton's testimony was the fact.

Q. Have you the opinion there?—A. I have.

Mr. Manager STERLING. I should like to suggest to counsel on the other side that the opinion go right in the record.

Mr. WORTHINGTON. We have noted it to put it in evidence when the time comes, and it might as well go in now as at any other time.

Mr. Manager STERLING. I suggest that it be offered now as evidence.

The WITNESS. I should like to refer to that part of the opinion——

Mr. Manager STERLING. I do not care to pursue it further. I want to call your attention to article 6. We offer the opinion in evidence.

The PRESIDENT pro tempore. Is it to be read at this time?

Mr. Manager STERLING. No, sir.

The opinion referred to is as follows:

[U. S. S. Exhibit 100.]

UNITED STATES COMMERCE COURT.

(No. 4. April session, 1911.)

Louisville & Nashville Railroad *v.* Interstate Commerce Commission, respondent. United States, intervening respondent.

ON FINAL HEARING ON BILL, ANSWER, AND PROOFS.

For opinion of Interstate Commerce Commission, see 17 Interstate Commerce Commission Report, 231.

For opinion of circuit court, refusing preliminary injunction, see 184 Federal, 118.

Mr. Helm Bruce and Mr. W. G. Dearing, for petitioners.

Mr. W. E. Lamb, for Interstate Commerce Commission.

Mr. J. A. Fowler, assistant to the Attorney General, and Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.

Mr. Alfred P. Thom and Mr. Walker D. Hines, for Southern Railway.

Mr. Edward Barton, for Baltimore & Ohio Southwestern Railroad.

Before Knapp, presiding judge, and Archbald, Hunt, Carland, and Mack, judges.

[Feb. 28, 1912.]

Archbald, judge:

A brief history of this case will aid in understanding the questions to be decided. For a number of years prior to 1907 the through rates on certain classes of freight over the Louisville & Nashville Railroad, the present petitioner, from New Orleans, La., to Montgomery, Selma, and Prattville, Ala., were higher than the rates on the same classes from New Orleans to Mobile, an intermediate point, plus the rates from Mobile to Montgomery and the other places mentioned. The through rates from New Orleans to these places were also similarly higher than the rates to Pensacola plus the rates from there to the same destinations, the two situations in this respect being identical.

This somewhat peculiar condition was brought about, as it is alleged, by the fact that the rates from New Orleans to Mobile and Pensacola were made lower than might justly have been charged, as well as lower than the general basis of rates prevailing in that section of the country, because of the necessity for meeting water competition between these places; from which policy it resulted, as is to be gathered from the record, that the rail line of the petitioner greatly increased its tonnage, and eventually secured the bulk of the traffic, the rail rates being continued for a number of years after the water competition had practically been eliminated.

Following, however, the enactment of the Hepburn law in 1906, the Interstate Commerce Commission, in an administrative ruling, which has several times been reaffirmed, announced that through rates in excess of the combination of intermediate rates would be regarded as prima facie unreasonable, and that the burden would be on the carrier to defend them. Subsequently to this, and possibly prompted by it, in June, 1907, the Montgomery freight bureau, on behalf of the commercial interests of that city, filed with the commission a formal complaint against the railroad, alleging that the higher through rates to Montgomery than the combination on Mobile, on certain classes and commodities, subjected Montgomery to undue prejudice and disadvantage, in favor of Mobile, in violation of section 3 of the interstate-commerce act. Influenced by this, no doubt, and by the ruling of the commission referred to, the railroad on August 13, 1907, advanced its rates from New Orleans to Mobile and Pensacola on certain classes of freight, by varying amounts sufficient in each case to make the new combination on Mobile and Pensacola correspond with the through rate to Montgomery. This action of the railroad, coupled with subsequent reductions on a number of articles, by taking them out of their respective classes and giving them special commodity rates, apparently had the effect of satisfying the commercial interests of Montgomery, and nothing further seems to have been done in consequence upon the complaint filed by the freight bureau of that city.

This did not, however, satisfy all parties. For a number of years the rates out of New Orleans had been the subject of agitation by the New Orleans Board of Trade, and at various dates, in October and November, 1907, complaints were accordingly filed with the commission by that body, severally charging that the rates to Mobile and Pensacola as recently advanced by the railroad, and the through rates to Montgomery and the points grouped with or based thereon, were unjust and unreasonable in themselves, as well as in comparison with the rates from Memphis, St. Louis, and Louisville. A restoration of the rates in effect to Mobile and Pensacola prior to August 13, 1907, was thereupon prayed, and a reduction of the rates to Montgomery, so that they would not exceed a combination of the locals by way of these places as thus established. The adjustment of certain commodity rates relatively to St. Louis and Memphis was also asked for.

The railroad duly answered these complaints, denying that the rates in force were unjust or unreasonable, and setting forth in detail the facts and circumstances relied on to justify them. But after answering and before any hearing by the commission had been entered upon, the railroad voluntarily established special commodity rates on a number of articles which had been complained of, thereby making the rates on all articles, or at least on most articles, from New Orleans to Montgomery points, as well as to Mobile and Pensacola, the same as or lower than the rates from Memphis and the other places named to these destinations. This was the undoubted intention of petitioner and appears to have been generally, if not completely, carried into effect.

The three New Orleans cases were heard by the commission together and were disposed of November 26, 1909, in a single report and order. This order, in substance, condemned the advance in rates to Mobile and Pensacola on the classes involved as unjust and unreasonable; directed the restoration of the rates in force prior to August 13, 1907, to these places; declared the through rates to Montgomery, Selma, and Prattville, to the extent that they exceeded the sum of the locals by way of Mobile and Pensacola prior to that date, to be also unjust and unreasonable; and prescribed for the future certain maximum rates to be maintained by the railroad for the statutory two-year period. The rates which were so prescribed to Mobile and Pensacola were the same in each case as the rates which had existed prior to the advance made by the company, and the rates to Montgomery were exactly equal to the rates to Pensacola and Mobile as so restored, plus the rates from these places to Montgomery, which remained unchanged; the rates to Selma being made up in the same way, and those to Prattville having the prevailing arbitrary added.

This order, by its terms, was to go into effect February 1, 1910, but was postponed by supplemental orders until April 15, following; prior to which time a bill in equity was filed by the railroad against the commission in the Circuit Court of the United States for the Western District of Kentucky, and an application made for a preliminary injunction. This application was heard by three circuit judges on bill and affidavits, and was denied by the court in an opinion by Judge Severens (184 Fed., 118); after which the order of the commission became effective and has since been complied with.

The commission having answered the bill, an examiner was appointed and a large amount of testimony taken on behalf of the petitioner, the entire proceedings before the commission, including the testimony submitted to it, being also under objection made a part of the record. No proof was offered in opposition to this in support of the order, *the commission taking the position that having been made after a full hearing, upon due consideration of the issues involved and in the exercise of the authority conferred by the statute, the order was not open to question.* Upon the organization of the Commerce Court the case was transferred here, and now comes up for disposition upon final hearing. It has been ably and elaborately argued in all its different phases, but there is only one that it seems necessary to pass upon, and that is, whether the commission, in the order which it has made, has not in a legal sense acted as charged in such an unreasonable manner that its order is invalid, having nothing of substance or persuasive force upon which it can rightly be predicated. This is claimed to result because the reasons assigned in the report either do not justify the conclusion reached or are so at variance with the undisputed facts that effect has plainly not been given by the commission to the evidence which was produced before it; and therefore, as it is put in the petition—repeated frequently in various connections—the "order is unreasonable, unjust, unlawful, arbitrary, and oppressive and in excess of the authority granted and powers conferred upon" the commission by the amended act to regulate commerce. Stated in another form the question is whether this order, tested by the principles recently emphasized by the Supreme Court in *Interstate Com. Com.* v. *Union Pacific R. R.*, decided January 9, 1912, should not be set aside because there was no substantial evidence to sustain it. That is to say, whether the commission, while in form acting within the authority conferred by the statute, has not in effect disregarded it. And it is to this question that we therefore address ourselves.

In this connection we take occasion to say that if the conditions dealt with in the report of the commission were substantially as they are there described we should have little hesitation in dismissing the petition. For even though in that case it might seem doubtful to us whether the commission had reached a just conclusion, it would nevertheless appear that there was room for differences of opinion, because different inferences were able to be drawn, and in such case the conclusions of the commission should be accepted as to matters thus clearly within its jurisdiction. But the question here is whether the report can fairly be regarded as of that character. On the taking of testimony in the circuit court after the preliminary injunction had been refused the entire evidence before the commission was introduced into the record, and it is to that evidence that reference is made in this opinion unless otherwise stated. That evidence we have read and reread with the utmost care, and it is because of our inability to understand how, on the facts which there appear, the report before us could have been made that the difficulty under which we labor arises.

By the express provisions of the statute (sec. 15) before going on to prescribe future rates the commission must reach the conclusion that the existing rates established by the carrier are unjust and unreasonable. It is the duty and the privilege of the carrier in the first instance to fix the rates to be charged (*Inter. Com. Com.* v. *Chicago Great Western Railroad*, 209 U. S., 108, 119), and it is only where, after due notice and a full hearing—whether on complaint of a shipper or upon investigation by the commission of its own motion—it is made to appear that the rate is unjust and unreasonable that the commission is empowered to fix another. The hearing which is so provided for is not a perfunctory one. The carrier is entitled to know and to rely on what is adduced at it, either for or against the existing rate, and the commission is not authorized to disregard it and reach a conclusion not at all justified by it. If the rate attacked is shown to be unjust, it may be abrogated and a new one established. But if that is not the outcome of the hearing and on the contrary it is clearly shown that the rate is not unjust, the evidence as to this can not be put aside, and if it is, and the commission without reference to it proceeds to condemn the rate and to fix another, its action is invalid.

After the most careful consideration, we are forced to conclude that the action of the commission in the present instance is of that character. Having regard to the evidence, the only tangible ground upon which it will be found to rest is the fact that there had been an advance in the rates to Pensacola and Mobile and that the Montgomery rate exceeded the sum of the rates through these points as they stood prior to this increase, making the increase in these intermediate rates the only proof of unreasonableness, not only as to Pensacola and Mobile, but Montgomery also. It is conceded by counsel for the Government that if this were true as to the rates to Montgomery, the order of the commission would be invalid, because it would not be based on the reasonableness or unreasonableness of these rates independently considered. And it is just as clear that if the reduction to Mobile and Pensacola was a mere restoration of the rates previously in force, based solely on the advance made by the railroad, it is equally indefensible. And, taking the case as it stands, there is practically nothing else, as it seems to us, that can be made out of it. Not but that other reasons are given by the commission. But it will be found upon examination, as stated above, either that they are entirely unsupported by the evidence or are involved in such capital mistakes with respect to it, or are in themselves so inconsequential as to the reasonableness or unreasonableness of these rates, that nothing can be consistently predicated upon them. And this we will now endeavor to demonstrate.

The New Orleans-Montgomery rate which has been set aside by the order of the commission was one of very long standing and was established with great circumspection. In 1886 Hon. Thomas M. Cooley, whose attainments are too well known to dilate upon, the first chairman of the Interstate Commerce Commission, was called upon by the railroads running into what was designated as the southeastern territory to arbitrate and adjust the relative rates from crossing points on the Ohio and Mississippi Rivers to certain places, such as Montgomery and others within the section of country roughly described as lying between the Memphis & Charleston Railroad on the north, the Gulf of Mexico on the south, the Chattahoochee River on the east, and the Mobile & Ohio Railroad on the west. He was not to determine specific rates, but their relation to each other. This question had first been submitted to Mr. James R. Ogden, as commissioner of certain associated railroads running into this territory, and after he had passed upon it it was submitted to Judge Cooley, who virtually affirmed Mr. Ogden's rulings. So far as the present comparison is concerned, it is sufficient to note that it was thereby decided that the rates from Louisville, Evansville, Cairo, and other like points on the Ohio River, to Birmingham, Montgomery, Selma, and other points within the defined territory, should be the same; that the rates from East Cairo, Columbus, Hickman, and points on the Mississippi in Kentucky should be 2 cents less; and that the rates from Memphis, Vicksburg, and New Orleans should be 4 cents less. An adjustment of rates was made by the railroads in accordance with this, including those from New Orleans to Montgomery and other points in that section, and these rates were maintained, at least so far as class rates are concerned, until the building of the Kansas City, Memphis & Birmingham Railroad from Memphis to Birmingham, which made a very much shorter line than had previously existed between these cities, when the rates on the first six classes of freight from Memphis to Birmingham were greatly reduced below what they had been, and those from New Orleans to Birmingham were also reduced to correspond relatively, in accordance with Judge Cooley's adjustment.

The reduction from New Orleans to Birmingham, however, proved too great and could not be maintained, and the rates between these places were at first restored to the original figures, and then reduced to an intermediate position; and this brought about a reduction on rates for these classes between New Orleans and Montgomery, Montgomery being intermediate to Birmingham. The final adjustment of these rates was reached in 1896, and as fixed at that time they remained substantially unchanged until 1910, a period of 14 years, when the commission made the order in question.

The original careful determination of the New Orleans-Montgomery rates, in their relation to those from Ohio and Mississippi River points into the same territory, in accordance with the Cooley arbitration; the subsequent readjustment of them upon the building of the Memphis and Birmingham short line; and their long-continued acceptance by the business public, during which time freight moved freely under them; all strengthen the presumption in favor of the reasonableness of these rates, against which there is practically nothing to militate except the previous competitive water rates from New Orleans to Mobile and Pensacola and the combination to be made on them to Montgomery. The conclusion is thus forced and, indeed, is patent on the face of things that the Montgomery through rates as now fixed by the commission are nothing more than the restored competitive Mobile and Pensacola rates plus the previous rates from those places to Montgomery.

There is no change, as it will be noted, in the rates from Mobile and Pensacola to Montgomery. The change in the Montgomery through rate is effected by reducing the rates from New Orleans to the intermediate points named and combining them with the rates from there to Montgomery, the reduction in the New Orleans-Montgomery through rates being exactly the same as the reduction made in the rates to Pensacola and Mobile as to every class except one—class E—where the through rate is reduced 1 cent, as against a 5-cent reduction to Mobile and none at all to Pensacola. This coincidence is too significant to be a mere accident or to fail to reveal the consideration which influenced it. It extends to the through rates to Selma and Prattville, as well as to Montgomery, not only by way of Mobile, but of Pensacola also, an exactitude which it is impossible to account for except upon the ground which has been suggested. Not only is the reasonableness or unreasonableness of the through rates to Montgomery, as fixed by the commission, thus made to depend on the reasonableness or unreasonableness of the Mobile-Pensacola part of them, but they are all obliged to stand or fall on the fact of this coincidence, by which, as conceded by counsel, they are not able to be defended. It is true, as already stated, that there are other reasons assigned by the commission in its report for the reduction in the New Orleans-Montgomery rates, but, with due respect to the commission, they do not bear up under examination.

The relation of rates established by the Cooley arbitration and the disturbance inevitably to result from a disregard of it was pressed upon the commission as strong grounds against the proposed changes. "The Cooley arbitration of 1886," it is said in the report, "has been strongly urged * * * as a reason for the nonreduction of the present advanced rates. This arbitration established a relation of rates as between the several Ohio and Mississippi River crossings, applying upon products from the territory north and west of those rivers destined to southern and southeastern territory, by fixing a basis for making rates from these several basing points to the southeastern territory, with the object of maintaining an equitable relation and equality of the basing rate as between said points on goods transported to southeastern territory, but we do not understand that this arbitration undertook to fix the actual rates for carriage from the several basing points to destinations in this territory. However, if such were the case, the building of new railroads, competition, and other causes forced many departures from the adjustment and the rates made under it, until it

has become materially altered, and it is inevitable and proper that it should yield to meet new and changed conditions."

From this, which is all the commission has to say on the subject, it would be supposed that the Cooley award was only a basis of adjustment accepted many years before, but which had come to have little more than historical value. In other words, that it was merely a starting point from which departures were frequently and freely made. If this were so, the commission might properly regard it as of no great importance and certainly as furnishing no substantial obstacle to further modification by the reduction of rates from New Orleans. But the record before the commission, as we read it, does not warrant the inference apparently intended from the statement above quoted. *Taken by itself the statement is not literally inaccurate, since it seems that some changes were made at various times in the rates on particular articles by taking them out of their respective classes and giving them special commodity rates, and to such extent as changes of this character were made they may be regarded in a sense as departures from the Cooley arbitration basis.*.

Moreover, the fact that the complaint of the New Orleans Board of Trade embraced in terms commodity rates as well as class rates, and that there was more or less testimony at the hearing which must have related to commodity rates doubtless accounts for what the commission says upon this subject. But when it is remembered that no change of consequence in class-rate relations had taken place since the original adjustment, except the one heretofore explained, and that the order in question pertains only to class rates from New Orleans, the matter presents itself in a very different aspect. Surely the long continuance of these class rates, which are the basis of the rate structure in that territory, and which must be assumed to have been equitably adjusted as between the various competing towns on the Ohio and Mississippi Rivers by the Cooley award, was a valid and persuasive objection to any order which would have a disturbing effect upon the class-rate situation. Nor was the force of this objection appreciably lessened by the circumstance that some articles were taken out of the classes from time to time and given commodity rates. Particularly is this so in view of the fact that the commission's report contains no intimation that class rates from other points should be reduced, clearly indicating that the order in question was not predicated upon any finding or contention that this class-rate adjustment was unfair to New Orleans. When therefore the facts in this regard are fully perceived their important bearing upon the controversy seems evident, and they are not to be dismissed from consideration, as they appear to be by the commission, on the mistaken view that "the building of railroads, competition, and other causes had forced departures from the adjustment of rates under it until it had become materially altered, as was inevitable and proper to meet changed conditions," as suggested.

As a further reason for making the order in question the report of the commission contains the following: "It was stated by the principal witness for the defendant that between points on its line where the through rate exceeded the combination of rates from point of origin to a competitive point and from said competitive point to destination shippers were given the benefit of the combination rate, and this provision appeared in special circulars and was very generally observed as a rule for the adjustment of freight rates; and such having been formerly the custom of the defendant, it would seem now to work no especial hardship upon it to reduce rates to the basis of the former combination."

The reference here is to the testimony of Mr. C. B. Compton, the traffic manager of the Louisville & Nashville Railroad, who has been with that road in continuous service in various capacities for some 40 years. But a careful reading of his testimony discloses no basis for the statement quoted, if it was meant thereby to imply that the Mobile combination was at any time allowed on through shipments to Montgomery.

On the contrary, it clearly appeared that such shipments had always paid the Montgomery rate, and that the Mobile combination could be secured only by shipping first to Mobile and then reshipping to Montgomery, as seems to have been done in a few instances. Indeed, this is recognized as the fact by the commission, since it is stated in an earlier part of the report that "prior to August 13, 1907, shippers, in order to get the benefit of the lower combination, sometimes shipped locally to Mobile and then reshipped to Montgomery, Selma, and Prattville." Of course, if the fact had been otherwise and the road had ordinarily or frequently carried Montgomery traffic on the Mobile combination, the commission might well say that it would be no great hardship to require the carrier to publish in its tariff the actual rates which it habitually accepted; but the undisputed evidence shows that the full Montgomery rate was constantly applied to Montgomery shipments, and we fail to see how that circumstance tended to show that the Montgomery rate was unreasonable.

It is undoubtedly true, as testified by Mr. Compton, that it was a more or less general practice to protect through shipments against the combination of locals, and a rule to that effect was carried by his road in certain of its local tariffs; but there was no such rule in the tariffs naming rates to Montgomery territory, and nothing whatever appeared at the hearing to indicate that through traffic to Montgomery was ever carried at less than the Montgomery rate. *A colloquy occurred in the course of Mr. Compton's examination in which he seems to have admitted that the rule in the local tariffs referred to, not being limited in terms, might be claimed to have authorized the application of the Mobile combination to Montgomery shipments.* But the point is not what those tariffs might have been construed to mean but what the actual practice was in respect of the traffic in question. Evidently the road was always careful to maintain this Montgomery rate. Everything indicates that it consistently did so. And it seems plain to us that the acceptance on other parts of the system of combination rates which were lower than through rates had no tendency to show that these particular rates were unreasonable. In short, when the undisputed facts regarding this feature of the case, as they appeared before the commission, are taken into account, they not only do not sustain the conclusion of the commission, but seem to be rather of contrary import.

With respect to the through rates from New Orleans to Montgomery as well as the southeast territory generally, it is further said by the commission, in justification of its action, that "It was shown that the merchants of New Orleans have heretofore made ineffectual efforts to secure better rates to this territory, as higher rates were in effect from New Orleans to this territory than existed from distributing centers at greater distances west and north of said territory, the situation being such that New Orleans was cut off from the trade of this section as to many products, and greatly restricted and burdened as to many others, on account of the high rates of transportation."

Tested by the complaints of the New Orleans Board of Trade, which, as above shown, embraced in general terms commodity rates as well as class rates, this statement can not be said to be wholly incorrect. Prior to the adjustments already referred to, and which were voluntarily made by the carrier, months before the order in question was issued, it was perhaps true that New Orleans merchants were at some disadvantage because the class rates from New Orleans on certain articles may have been higher than or out of line with the commodity rates from other points on those articles. But this cause of complaint, to whatever extent justified when the proceedings before the commission were instituted, was substantially if not wholly removed before the hearing was concluded by the reductions and adjustments hereinbefore mentioned, which resulted in actual rates from New Orleans lower on most articles and not higher on any article than rates from Memphis and other points west and north of Montgomery. And this was apparently recognized by the commission to be the case, since it made no order respecting commodity rates. But when the paragraph quoted is tested by the class rates, which are the only ones reduced by the commission's order, it is not only not supported by the testimony, but the contrary is shown by proof that is not open to question. Instead of being discriminated against by the class rates to Montgomery territory, New Orleans has had an actual advantage over the Ohio and upper Mississippi River towns, an advantage over Memphis in the higher classes and at least equality with it in the other classes, and an equality with Huntington, Vicksburg, and the lower Mississippi points to Memphis; all of which is established by comparative tables which stand unchallenged and by the tariffs, as we are advised, then on file with the commission. So far, therefore, from sustaining the action of the commission, the undisputed facts in this regard tend unmistakably to a contrary conclusion.

But the commission also mentions that the rates from New Orleans to Montgomery, Selma, and Prattville were higher on all the classes than those from typical points in the Southeast, where the distances were greater, such as Brunswick and Savannah, Ga.; Charleston, S. C.; Wilmington, N. C.; and Nashville, Tenn.; to say nothing of Virginia and North Carolina points, which are referred to in another connection. But in this comparison the commission for its initial points goes over into an entirely different territory. It leaves the Mississippi and Ohio Rivers and goes to the Atlantic coast, in the Carolinas and Georgia, without any suggestion that traffic conditions from there to Montgomery and Selma are at all similar to those from New Orleans, which is the subject of comparison, the only basis of contrast being one of distance. The railroad company in its bill makes complaint of this and avers that the conditions are so dissimilar as to render the comparison unjustified, and that no issue as to the reasonableness or unreasonableness of the rates so applied as a standard was made, nor any evidence introduced which was addressed to that inquiry. And this the commission in its answer admits, conceding that there was no *fixed* relation between the rates from these points and those from New Orleans; which we understand to mean no definite or determining relation.

So also with regard to the rates "from New Orleans to certain stations just outside of Montgomery on the Mobile & Ohio Railroad," which are said by the commission to be less than the rates to Montgomery by the Louisville & Nashville. The bill avers that these were unimportant local points which did not enter into competition with Montgomery; that the traffic to them was insignificant; that no testimony was taken concerning them; and that the Louisville & Nashville Railroad does not publish or participate in or have anything to do with them. And the commission, answering this, admits that the reasonableness of the rates to these local points was not in issue, and that no attempt was made to determine whether or not they were reasonable, and that it did not undertake to determine the reasonableness of the rates prescribed in the order complained of on the basis of the rates referred to. But if all this be so, it is difficult to see why there was any reference made to them at all, or why they were put forward by the commission in the way they were to justify the order, if they had no influence upon it. The effect of the answer, therefore, is to eliminate this part of the report, aside from the other considerations which also do so.

Equally immaterial is the statement that the rates from Virginia cities to Montgomery and Selma are less than from New Orleans, although covering twice the distance, or that those from north Atlantic ports to points in the southeasern territory basing on Montgomery are more favorable, length of haul and number of lines considered, which are some of the minor things entering into the decision. And especially is this to be said of the water rates from New York and Boston to Mobile and New Orleans, which have no perceptible bearing on the rail rates between the latter two places in the connection in which they are cited.

By contrast with this, it might be inquired why the commission in making comparisons took no note of the rates established by the railroad commissions of Alabama and Georgia, which show that for 141 miles, the distance between New Orleans and Mobile, the accepted-as-controlling factor in the situation, the rates by the Louisville & Nashville Railroad, which have been condemned and reduced by the commission as unjust and unreasonable, were materially less than the maximum or so-called standard tariff established by the Georgia commission, and much lower still than the rates which were permitted to the Southern Railway in Alabama, Georgia, Tennessee, and South Carolina, as will appear by the comparative table which is reproduced below as taken from the evidence:

	Class—						
	1	2	3	4	5	6	E.
Louisville & Nashville rates from New Orleans to Mobile, 141 miles	50	39	38	31	27	16	20
Southern Railway rates fixed by commissions of Alabama and Georgia for 141 miles	75	63	56	44	35	29	35
Minimum or standard tariff of Georgia Railroad Commission, 141 miles	60	50	45	35	28	23	28
Southern Railway rates in Tennessee, 141 miles	58	50	46	37	31	27	32
Southern Railway rates in South Carolina, 141 miles	62	52	42	39	31	24½	31
Southern Railway rates, Chattanooga to Birmingham, 143 miles	57	49	41	32	27	19	27
Southern Railway rates, Birmingham, Ala., to Columbus, Ga., 157 miles	57	49	45	35	28	22	27
Southern Railway rates, Chattanooga to Atlanta, Ga., 138 miles	52	45	41	32	25	20	27

Let us not be misunderstood upon this point. We recognize, of course, that comparisons are very commonly made in the investigation of rate

cases, and that they may often be quite persuasive. The competency of such evidence is not questioned nor the right of the commission to give it due weight. Neither is it doubted that the commission may receive evidence of this kind, giving to the facts so shown their proper value, without proof of similarity of conditions. But what we do hold is that the comparisons made by the commission in its report in this case, taking into account all the facts and circumstances disclosed at the hearing, had no evidentiary bearing upon the reasonableness of the rates in dispute, and therefore furnish no appreciable support of the commission's conclusion.

As a further justification for the reduction of the rates to Montgomery the commission suggests that the rate per ton per mile, on an average of the first six classes of freight, is much greater from New Orleans than from Memphis, St. Louis, or Louisville. It is not said, as will be noted, that the rates to Montgomery are higher than from Memphis and the other places mentioned, but that, considering the distance, the rate per ton per mile is greater. But it is the ordinary and recognized rule that the ton-mile rate should decrease as distance increases, other things being equal, and we therefore fail to see how the lower ton-mile rate for the greater distances from Memphis, St. Louis, and Louisville tended in any respect to show the unreasonableness of the rates here in question.

Finally, as a summing up of this part of the case, the commission says: "The manufacturers and shippers of oil, paper, stovepipe, tinware, galvanized tubs, furniture, soap, window glass, paints, hardware, and other articles of like kind in daily use, testified that they were unable to trade in the Montgomery and Selma territory on account of the high rates, and that upon former occasions they had made special efforts to build up a trade with cities located in this territory and *points basing* thereon, but in every instance they were compelled to abandon the fight on account of better freight-rate concessions from other markets, though at greater distances. With respect to practically all of the commodities above enumerated schedules of comparative rates and distances were filed corroborating complainant's contention."

This statement also can be explained only on the theory that it relates to what the New Orleans Board of Trade alleged in its complaints and to conditions which may have existed in some degree before the road made the reductions and adjustments already mentioned. But having reference to the class rates in question, to which the commission's order is confined, we are unable to find any evidence which tends to sustain the observations made with regard to the inability of New Orleans dealers to trade in the Montgomery-Selma territory.

Take, for instance, the testimony of George P. Thompson, a wholesale grocer of New Orleans, the first witness who has anything to say on the subject. His testimony has mainly to do with Mobile and Pensacola. But being asked by counsel whether it would be possible to increase his business with Montgomery if the rates were adjusted on a fair basis he says that it would, a self-evident proposition, but by no means showing that the rates in force were not what they ought to be. The further statement, which he is led to make by suggestion of counsel, that the rates from Memphis to Montgomery are lower than from New Orleans can not refer to class rates, it being irrefutably shown that they are in fact higher. And the comparison made by counsel in a long leading question with regard to the rates from Baltimore, to which Mr. Thompson gives hesitating assent, is of no more significance than the similar comparison with other North Atlantic points made by the commission, already referred to. It is true that as to certain canned goods, such as beans and peas, he is handicapped, as he says, by the rates from such points as St. Louis and Memphis. But here again the reference must be to commodity rates which have been adjusted, and must have been so understood by the commission, as it does not include peas and beans in the list of articles said to be discriminated against by the rates to Montgomery. And this must also be kept in view when it is said by Mr. Thompson that he is kept out of that territory unless he is willing to absorb a part of the rates, which is not true as to class rates, the only ones which are here in question.

W. O. Hudson, manager of the Marine Oil Co., the next witness, confesses that he knows nothing with regard to the Montgomery-Selma case. Being asked if he could do business in Montgomery if the rate were reduced to 13 cents a hundred, the reduction subsequently made by the commission, he declares that he could not, that the rate would eat him up, the explanation that he gives being that the great bulk of the oil which he handles comes from the Ohio and eastern fields, which are much nearer to Montgomery than he is. Notwithstanding this, and although he is the only witness who testified on the subject, oil is given by the commission as one of the commodities shut out by the high rates from New Orleans into this territory.

E. C. Palmer, a wholesale paper man, admits that business with Montgomery has not been materially injured by the advance in rates, but avers that it will be when his customers understand the situation. He thinks that Nashville has an advantage over New Orleans in the rate on paper (as no doubt it has); and that, as compared with Baltimore, considering the haul, the New Orleans rate is "a little out of line" (although it is not in fact higher); but that, compared with Louisville, it is fair enough. And so far as being kept out of Montgomery is concerned, he says that, on the contrary, he ships there constantly. No one can read the testimony of this witness without being convinced that, except possibly as to Nashville, New Orleans is not only not discriminated against, but has an actual advantage in the rates on paper over every place that it comes in competition with in the Montgomery-Selma territory.

A. D. McBride, a salesman engaged with the National Enameling & Stamping Co., says that he sells goods in Mobile and Pensacola, but not in Montgomery or Selma, because Atlanta, Ga., has lower rates and gets the business. As compared with St. Louis and Louisville he does not see that New Orleans is at a disadvantage, notwithstanding the efforts of counsel to have him say so. The competition which affects him is with Atlanta, and that is the whole of it. Nor even there does he charge that the advantage is an unfair one, but simply that the Atlanta rate to Montgomery is lower and keeps him out of there. Notwithstanding this state of the evidence, however, stovepipe, tinware, and galvanized tubs, the commodities that this witness deals in, he being the only one called to testify with regard to them, are included by the commission among those which it is declared that New Orleans dealers, on account of the high rates, have been unable to sell in the Montgomery-Selma territory, being compelled to abandon the fight, as it is said, after an attempt to build up the trade, a statement as to which there is no approach in the testimony.

J. W. C. Wright, president of the New Orleans Furniture Manufacturing Co., says that Montgomery is not important to them. They ship some furniture there, but have not solicited the trade very strongly; and substantially the same thing is testified by P. Jung, of the Crescent Bed Co., an iron-bed manufacturer.

S. Steinhart, a manufacturer of soap, sells soap in Montgomery, where he says he encounters a rate of only 19 cents from Nashville as against 23 cents from New Orleans; but there is no 23-cent class rate from New Orleans, and he must therefore be referring to a commodity rate, which, as we have already seen, has no bearing.

J. W. Bray, another witness, who is treasurer and manager of the Campbell Glass & Paint Co., says that they are shut out of Montgomery and Selma, the rates being such that they are unable to ship there. But so far as the paint business is concerned, he also says that it is handled entirely from St. Louis, where his company has a house from which they prefer to ship, the rate being more advantageous; and that as to their glass business, Montgomery is not a normal point for it, which hardly makes out that the rates from New Orleans are too high or that he has ever tried unsuccessfully to adjust them.

Harry Moore, who is in the wholesale hardware business, declares that he can not compete with St. Louis, Louisville, and Nashville; but he gives as a reason that, while these places are only one-half the distance from producing centers, such as Pittsburgh and that territory, they pay one-third the rate, and are thus able to get into Montgomery and Selma and places basing on them at much less than he can. But the discrimination here, as is evident, is in the rates from producing centers to the distributing points named, and it is impossible to expect that this should be made up to New Orleans by a back rate to Montgomery that would absorb the difference.

It is difficult, therefore, to see, in view of the testimony of these several witnesses, how furniture, soap, window glass, paints, and hardware were included as they are in the statement by the commission, which has been referred to.

George Weigand, who is in the provision business, and who has been "howling to heaven," as he says, with regard to the rate increase complained of, refers only in this to the rates to Mobile, having never tried to go to Montgomery or Selma.

S. Odenheimer, a manufacturer of cotton goods, makes general complaint of the discrimination in rates from all competitive points where there are cotton mills to Montgomery and Mobile. But it appears from his testimony that there are cotton mills at Montgomery and Mobile as well as at New Orleans, to say nothing of the other places mentioned, and it is altogether unreasonable to expect that rates on cotton manufactures should be put so low that mills at other points shall be able to compete with those actually on the ground. The commission makes no reference to cotton goods in connection with the Montgomery rate, and therefore evidently took this view. Mention was also made by this witness that the rates southerly from Montgomery to New Orleans were lower than those northerly from the one place to the other. But the explanation given him by the company was that there are a good many empty cars going in the direction of New Orleans and none the other way, which might properly justify the distinction.

R. J. Wood, manager of the Gulf Bag Co., manufacturers of burlap bags, testifies that at one time, although not recently, they consigned goods to friends in Mobile to have them reconsigned to other points in Alabama, because the combination on Mobile was less than the rates through there. He also says that the question of the rates from New Orleans to Montgomery and Selma being higher than the combination on Mobile was an old one, and had been up ever since he was connected with the New Orleans Board of Trade, some seven years, complaint being made and efforts put forth to correct it.

All that his company have ever asked, as he says, is the same rates that eastern ports have to points halfway distant to New Orleans, which they have never got, and are therefore at a disadvantage. They have better rates, comparatively speaking, according to this witness, to the Carolinas than to Alabama and Georgia, and there are 18 or 20 points in Georgia to each of which the mileage is less from New Orleans than from New York, Philadelphia, or Baltimore, and yet the rates are invariably higher; in consequence of which the Southeast, for his company, is a dumping ground, where they get rid of any overplus, but do not expect to make money. They sell at Atlanta, but make nothing. That city is a bag consumer, but there is a bag concern there, and Atlanta itself complains of New Orleans. This extract from the testimony of this witness is perhaps unnecessary, as the commission does not include burlap or gunny bags among the articles alleged to be discriminated against, so far as concerns the Montgomery-Selma territory. It is only Mobile as to which this is predicated with regard to these articles, and it will be noted that what he says has no application to Mobile.

In this connection a protest, dated August 6, 1902, drawn up by the attorney of the New Orleans Board of Trade, was introduced in evidence before the commission, in which the existence of discriminating rates against New Orleans into the southeastern territory was charged, the fact that the through rate to Montgomery and Selma was higher than the Mobile combination being also mentioned. New Orleans and Mobile, as it is there contended, stand in the same relation to the sources of supply and are competitors to points beyond them, and claim is made that outbound rates from New Orleans should therefore carry but slight differentials. The rest of the paper is mainly an argument why New Orleans should be put on an equality of rates which would permit of competition with New York and Baltimore as well as Georgia, the Carolinas, and Virginia—a broad question not in issue here, as already pointed out, and therefore not relevant or properly to be considered.

This completes the evidence on this branch of the case, and there is no need to dwell on the view to be taken of it. Considered severally or collectively, it contains nothing which we can discover that supports the conclusions of the commission with respect to the Montgomery rates, outside of the fact that, if the reduction is to stand to Pensacola and Mobile, it calls for a reduction to Montgomery to equalize the sum of the locals. It is not simply that the weight of the evidence does not sustain the reasons assigned by the commission in its report, but that there is no substantial basis for those reasons in the testimony passed upon.

The Mobile and Pensacola rates remain to be considered, both on their own account and as the essential basis of the rates to Montgomery. It is to be noted with regard to these that as the law then stood the mere fact that they were increased by the company over what they had been previously creates no presumption that they were not fair and reasonable. (Interstate Commerce Commission *v.* Chicago Great Western Railroad, 209 U. S., 108.)

Nor did it justify the commission in putting them back to what they had been, without regard to whether that could be properly said of them. But this again is practically all that there is to sustain the commission's action. It is undisputed that these rates to Pensacola and Mobile were the result of severe water competition, and that this had disappeared at the time of the increase. "At the date of the hearing," say the commission, "carriage by water was infrequent and

cut but little figure as a competitor" with the railroad. It is also stated that while the rates by rail were generally higher than by water, this was not the case in the third, fourth, and fifth classes, under which the bulk of the freight between New Orleans and Mobile moved; notwithstanding which the commission proceeded to reduce the rates for these classes to what they had been before, actually making them 6, 9, and 8 cents, respectively, below the established water rates as they then stood.

Take also the relative result brought about by the commission's action. It may be that no point should be made of the fact that, taking the rate on first-class goods, which the commission accepts as fair, having made no change in it, the other rates are disproportionately low by comparison. This is the uncontradicted testimony of some of the witnesses, though it may be said that the commission was not bound to adopt their view of it. But that there is a material disparity is observable on the face of things, and also that it breaks in upon the ratio established by the railroad, which was accepted and lived up to all these years—a somewhat significant circumstance. More than that, however, in making the rates on fifth and sixth class goods 35 cents each to Montgomery and 15 cents each to Mobile, while they are 20 and 15 cents, respectively, to Pensacola, the classification is inconsistent, to say nothing of the testimony of some of the witnesses, who assert without contradiction that if 15 cents is correct for the sixth it is too low for the fifth class; while in fixing the rate to Montgomery at 77 cents on second class and 55 on third class—based on a 37 and 25 cent rate to Mobile, respectively—there is a drop of 22 cents, which, according to the undisputed evidence, creates a disproportion between these two classes that is unprecedented in all that territory. And the same is true as to the 12-cent drop between these classes in the rate to Mobile, which is a reduction of 33 per cent on the face of one and 50 per cent on the face of the other, according to the one that is taken for comparison. It is no answer as to any of these Mobile rates that there were the same inconsistencies in the formerly prevailing rates of the railroad. These were competitive rates with respect to which nothing reliable can be predicated without knowing just what produced them. The resort to them for justification in this way merely serves to demonstrate the intimate relation which they bear to the order of the commission.

It is said, however, in the report of the commission that the Mobile and Pensacola rates had remained substantially unchanged for over 20 years, and that there was no evidence that they had not been compensatory. At the time this statement was made the increased rates were in force which were established in 1907, and not the old ones in existence before that. And it was the unreasonableness of these new rates which the complainants in the proceeding had the burden of showing. There was no adverse presumption to be indulged, as we have seen, because of the increase. (Interstate Commerce Commission *v.* Chicago Great Western Railroad, 209 U. S., 109.) Nor is a voluntary rate, established to met competition, to be taken as the measure of what is reasonable. (Lake Shore R. R. *v.* Smith, 173 U. S., 684; Frederick *v.* N. Y., N. H. & H. R. R., 18 Inter. Com. Com. Rep., 481, 484; Breese *v.* Trenton Mining Co., 19 Inter. Com. Com. Rep., 598, 600.) And yet that in effect is just what the commission did in suggesting in defense of the reduction and restoration which it undertook to make that the previous rates were not shown negatively not to have been compensatory. It was not incumbent on the railroad at that stage to make this out, but on the complainant to show that the rates as they stood were unjust and unreasonable. The position taken here, on behalf of the commission, is that a rate, however low, can not be condemned as unjust if it yield any, the most insignificant, return above the cost of service, a proposition we are not prepared to accede to.

As further justifying the reduction made, it is declared by the commission that the rates to Mobile and Pensacola exceeded the rates from New Orleans to other water-transportation points, such as Natchez, Vicksburg, Greenville, and Memphis, where the distances are greater. This clearly is not true as to Mobile, whatever may be the case as to Pensacola. The rates from New Orleans to the Mississippi River points mentioned, as contrasted with those to Mobile, according to the schedule at the time on file with the commission, will appear by the following table:

	Classes—					
	2	3	4	5	6	E
Rates to Natchez, Vicksburg, Greenville, and Memphis..	40	32	25	20	17	15
Rates to Mobile as reduced by the commission.....	37	25	18	15	15	15

It may be that the commission in the statement which it made had the rates in mind as raised by the railroad, as to which, however, it would be true only with respect to the third, fourth, and fifth classes. But that is not the way it is put, nor is it the use made of it in argument, which is that the rates to Mobile as they previously stood and as they were reduced and restored still exceeded those to the other water-transportation points which are mentioned, which is a clear misapprehension.

It is also said by the commission in the same connection that these rates exceed those from Nashville, Memphis, Cincinnati, and Louisville to points approximating the same distance. There is no way of knowing on what this is predicated, there being no reference to any schedules or tables of comparison by which to verify it. Neither is there anything in the evidence before the commission which apparently warrants it. And by contrast, in the evidence taken under the bill which is now before us, it is proved without contradiction that in a large number of instances the fact with regard to the rates from the places named is just the opposite.

Another ground taken by the commission to justify its action is that the rates between New Orleans, Mobile, and Pensacola, until the advance made by the railroad, were identical in both directions, westward as well as eastward, a condition which prevailed, as it is said, between other cities, such as New Orleans, Memphis, Greenville, Vicksburg, and Natchez, and that the raising of rates in the one direction resulted in a disturbance of relations between points where geographic and commercial conditions called for equality. But it has often been recognized by the commission that the mere fact that a rate is higher one way between the same points than it is the other does not prove that the higher rate is unreasonable. (Duncan *v.* Atch., Topeka & Santa Fe, 6 Inter. Com. Com. Rep., 85, 103; McLoon *v.* Boston & Maine R. R., 9 Inter. Com. Com. Rep., 642; Weil *v.* Pa. R. R., 11 Inter. Com. Com. Rep., 627.) And this is particularly true where there is a preponderance of empty cars moving in the one direction, of which there is here some suggestion. There is also some evidence that the rates westward from Mobile to New Orleans are lower than they should be; all of which goes to show that there is practically nothing to be made out of this contention.

It is further said by the commission that the advances made from New Orleans to Mobile in the enumerated classes were severely felt by certain shippers in the former city, especially those engaged in jobbing canned goods, lard, flour, coffee, oil, crackers, pickles, vinegar, beans, etc.; that New Orleans is an important distributing market for canned beans, some 400 to 500 carloads being handled there; and that the increase on this commodity was particularly burdensome, if not practically prohibitory of shipping into New Orleans and out of Mobile. That the advances made in the rates on these classes of goods would be severely felt by certain shippers is not a sufficient reason for holding that they were not what they ought to be. Such an advance would of course be felt, and so would any other change in market conditions which affected the cost of handling. With regard to the other statements made by the commission in this connection, it is undoubtedly true that New Orleans and Mobile are both jobbing points; but so far as concerns beans, they get their supply from practically the same markets and at the same freight rates. In this respect they are rivals; and it is altogether out of line to expect that the rates on beans from New Orleans to Mobile should be so reduced that the jobbers in New Orleans can compete with those in Mobile, and thus invade the latter's own home market.

A counter protest from the jobbers in Mobile, if this were done, would be in order as a matter of self-protection and would have to be listened to. The same is true with respect to the other commodities named, as it is also with regard to paper, stovepipe, tinware, tubs, and galvanized-iron tubs, as to which, according to the commission, the advance in rates made by the railroads would have to be absorbed by the manufacturers.

The evidence with regard to all this is not in conflict. Take, for example, the testimony of George P. Thompson, president of the New Orleans Grocers' Association, which has already been referred to in connection with the rate to Montgomery. He has been selling canned goods, crackers, and baking powder at Mobile for a number of years, as he says, and the advance in rates, according to his statement, has affected him materially. There has also been a serious falling off in peas and beans, particularly the black-eyed beans which are dried in bags, the best coming from California. Mobile, as he says, is a large consumer of these for export and otherwise, and if New Orleans is shut out from there it means a control of the bean business by the railroad. But he admits that Mobile can buy beans from California as cheaply as he can and that the rate from there to each of these two cities is the same. And he therefore, when you come to analyze it, simply wants the local rate from New Orleans to Mobile kept down to a point where he can have a chance to compete at Mobile or places basing on there with the Mobile jobber on the same product. So also with regard to canned goods, baking powder, candles, etc., the rates on which from Memphis to Mobile are shown to be less than from New Orleans; the comparison so made is of no particular significance without a consideration of how the rates from Memphis happen to be what they are (whether these rates are class or commodity) and why that city enjoys this apparent advantage. Mr. Thompson also speaks of New Orleans as a great distributing port for olive oil and coffee, and thinks that recognition should be given it on outbound rates accordingly; but except that Mobile buys oil from New Orleans he makes no application of his statement.

W. O. Hudson, manager of the Marine Oil Co., says he is forced into competition at Mobile with oil from the Ohio oil field, from whence also he gets his supply from the National Refining Co., which has refineries at Cleveland, Marietta, and Findlay. He stocks up for Mobile from there, but it would suit him better to do so from New Orleans, which would relieve him from the necessity of carrying so many men, and where his facilities are greater. These purely personal considerations have no bearing, of course, on the reasonableness of these rates, which are not to be fixed to accommodate any particular person's business.

There is but one witness, Mr. E. C. Palmer, who has anything to say about the paper industry. Testifying eight months after the advance in rates had gone into effect, while he feels that it may be injurious when his customers get onto the idea, he admits that so far it has not been so. His concern also is only as to goods going through Mobile to points beyond and not as to Mobile proper, although he does business there. New Orleans, as he says, is the principal distributing point in the South for newspaper material, competing with St. Louis, Cincinnati, and Nashville, but having an advantage in rates, as a rule, from western points of manufacture, the rates to New Orleans and to Mobile being equal. There would seem to be nothing calling for relief in this situation.

So, also, with reference to stovepipe, tinware, tubs, and galvanized tubs, Mr. McBride, of the National Enameling Co., says that the manufacturers have not been compelled to absorb the advance, as stated by the commission, although he thinks it probable in the end that they may have to do so. Prices have been increased to the extent of the advance, but no one in Mobile has declined to buy on account of it. It simply has increased the cost to the jobber, and he in turn sells higher to the retailer. He admits that the New Orleans manufacturers still have a lower rate to Mobile than any other point with which they come in contact; but the difference is slight, and it would take but a small advance to equalize it. The trade at Mobile has been accustomed to buy goods delivered, and it is going to be difficult, as he says, to get the increase from them in the future, although the New Orleans manufacturer is now doing so. Under normal conditions the manufacturers would have to absorb the advance and keep the Mobile jobber on a par with others, but now it is done by the jobber.

There is nothing in any of this to sustain the findings of the commission which have been referred to, or to justify the reduction which it has ordered. The rates to Mobile were so low before that the manufacturers in New Orleans could afford to absorb them and did so. They can not, perhaps, afford to do so now. And because the Mobile jobber has become accustomed to get his goods free the manufacturers in New Orleans anticipate trouble. But this is a possibility which the railroad can not be required to prevent, and the situation as disclosed by this witness indicates that the former rate was certainly low.

Again, the commission makes the statement that the advance in rates on furniture, iron beds, etc., had practically closed out the business with Mobile in these articles, better rates being made on them from other manufacturing points, such as Atlanta, Ga., and High Point

and Winston Salem, N. C. This is a clear mistake of fact, due no doubt to inadvertence, but none the less serious, it being the uncontradicted evidence that, with one single exception, where the rate from Atlanta to Mobile is a cent lower than from New Orleans, all the rates on all the articles named from the three places mentioned are not only higher, but very materially higher, than from New Orleans. It is true that, according to Mr. Wright, there is a restrictive loading rule with regard to furniture from New Orleans to Mobile which is not imposed as to Nashville and Memphis. But this does not apply to any other points, and while it apparently gives some advantage to Memphis over New Orleans, Nashville is simply put on an equality with it. It is to this rule, also, and to the changed classification of mixed furniture in carloads, that he ascribes his loss of trade rather than to the present rate advances.

The testimony of P. Jung, another iron-bed manufacturer, is even less to the purpose. He says he never sought the Mobile field nor made any effort to get into Pensacola and has not been affected by the advance in rates to these places. Before the advance he solicited business throughout Alabama and Georgia, but found that he would have to guarantee rates as against Atlanta, High Point, and Winston-Salem, and that the trade did not warrant it. Evidently the increase did not harm nor would the reduction help him.

This is all the evidence there is as to furniture and iron beds, and it is clear that it does not in any particular support the statement of the commission.

It is further said, however, by the commission that the advance in rates on bags, burlap, gunny, and jute was vigorously opposed, and a strong protest also made on account of the alleged discrimination against New Orleans in cotton goods, it being asserted that other manufacturing points were given more favorable rates. This is sought to be sustained as to cotton goods by a comparison of rates from Virginia and North and South Carolina points, as well as from Augusta, Ga., and even from New York and Boston. The suggestion that the advance was vigorously opposed or that a strong protest was made affords neither evidence nor argument. This is always to be looked for where there is an increase in prices, whether warranted or unwarranted. Nor is anything more to be made out of the rate comparison. The commission does not say that the rates to Mobile on cotton goods are less from other manufacturing points than from New Orleans, which is not the fact, as is demonstrated by the evidence, but only that the rates are more favorable. But this is based on the mere matter of distance, which is no criterion, as already stated, without the consideration of other attending conditions. As pointed out also in connection with the Montgomery rates—according to the testimony of Mr. Odenheimer, on which this part of the case is evidently based—there are cotton mills both at Mobile and Montgomery, as well as at the other competing points named, and it is not to be expected that rates on cotton goods should be put so low that New Orleans manufacturers would have an advantage over all others in that territory beyond what they already have; which would be the rankest discrimination. And the matter of burlap and gunny bags is not much different. The testimony of Mr. R. J. Wood is directed to this and has already been considered in another connection. So far as Montgomery and Pensacola are concerned, he frankly says that the advances have not injured his business. His complaint is as to points beyond, with regard to which he has not a little to say, but it has been discussed above and there is no occasion to again go over it.

This completes the case as to Mobile; and that with regard to Pensacola, except that it is still weaker, is no different. It is said by the commission that the advance in rates "was not so heavy or so injurious to the merchants in New Orleans in their trade with Pensacola as the advance to Mobile, but they strongly protested against it, and it was shown that, proportionately, like conditions resulted from the advance as were produced by the increase in rates to Mobile." But there is nothing to sustain this statement. One witness, Mr. Palmer, a paper dealer, says that he would be affected in Pensacola the same as Mobile; but he is not affected at all at Mobile and can not, therefore, be at Pensacola. Another, Mr. Steinhart, who deals in soap, says that they get no orders from Pensacola because the rate is said to be so high; and what he wants and thinks the company should come down to, as he is not slow in saying, is a 10 or 12 cent rate, the same as on rice and sugar, which is hardly to be expected. The other witnesses called, to a man, declare either that they have no complaint to make or that their business at Pensacola is slight or that they have not been affected; and yet the commission finds with regard to the trade with Pensacola what has just been stated.

Opposed to the evidence which has been thus referred to—if there can be said to be any opposition to what is so irrelevant and wanting in persuasiveness on the question as to what is reasonable—there are several witnesses produced by the railroad company of large experience, who testify that the rates prescribed by the commission, both to Mobile and Pensacola, as well as to Montgomery, are unjust and unfair, under all the circumstances, and among others, because they are less than those usually and ordinarily charged by the company, as well as by other railroads for the transportation of like classes of property between other points in the South separated by similar distances; because the rates which were cut down permitted a free movement of traffic and there were no competitive or commercial conditions calling for a reduction; and because the rates as reduced would give to New Orleans an undue and unreasonable advantage and preference over Vicksburg, Memphis, and other Mississippi and Ohio crossings, and would disrupt and destroy the relative adjustment and the general system of rates which have prevailed in the southeastern territory ever since the Cooley arbitration. It is also indisputably shown that the New Orleans-Mobile line along the Gulf coast is exceptionally difficult and costly to operate; that a considerable portion of it consists of long trestles and bridges which are subject to extraordinary damage and sometimes to a complete destruction by floods and freshets in the streams which they span; that its proximity to the Gulf lays it open to the full force of the Gulf storms and hurricanes, by which it was entirely put out of business for nearly a month in the early fall of 1909, and for considerable periods at different times previously; that the intermediate territory traversed is so sparsely settled and its freight traffic so small that the successful and profitable operation of the line is necessarily dependent on the through traffic between New Orleans and Mobile and points beyond, in consequence of which the company has never received even a fair return from its operations; and finally, that the cost of operation by reason of the increase in wages, in maintenance, and in the price of locomotives, cars, and other matters of equipment, has grown so enormously in the last few years that to go back to rates established under earlier conditions, when there was active water competition, instead of being fair and reasonable, is to work great and manifest injustice in disregard and in the face of this undisputed showing.

There was no attempt to meet the case as so made out for the company either by way of argument or otherwise. Counsel for the commission and for the Government simply rely on the authority of the commission to determine what is a reasonable rate and the conclusiveness of its judgment where it has done so, against which, it was argued, the courts can afford no relief unless the rate which has been fixed is shown to be confiscatory. But this contention, as presented and sought to be applied in the case at bar, must be rejected. In our judgment, it was never intended to confer on the commission any such unrestrained and undirected power. As already pointed out, the law provides for a hearing, and it must be more than a shadow. Both parties are entitled to be confronted with the evidence on which the case is to be determined, and the conclusion reached must be a reasonable inference from the facts disclosed by the investigation. This construction of the commission's authority and the conditions which limit its exercise appear to us clearly and definitely settled by the recent decision in Interstate Com. Com. *v.* Union Pacific R. R., supra, which is the latest and fullest utterance of the Supreme Court in a case of the same general class as the one now under consideration. Tested by the principles laid down in that decision, we are of opinion that the order here drawn in question must be held invalid as exceeding the delegated powers of the commission, because there was no substantial evidence to sustain it. It is not merely that the evidence preponderates in favor of the reasonableness of the rates which have been cut down. Concededly, that would not be enough to challenge the action of the commission. Not only is the commission vested with a discretion which can not be disturbed, and which we intend unqualifiedly to respect, but it is entitled to select the testimony which it will believe and rely upon, according as it addresses itself to the discriminating judgment of the commission. But it is not within the authority of the commission to reduce the rates in this or any other case, not merely against the weight of the evidence produced to sustain them, but without anything substantial to warrant the conclusion reached or the reasons assigned therefor. And this we are convinced is a case of that character. The only discoverable basis for condemning the rates to Mobile and Pensacola is the fact that they had been advanced in 1907, and this of itself was clearly not sufficient. (Interstate Com. Com. *v.* Chicago Great Western, 209 U. S., 108.) If the long continuance of lower rates to these points or the circumstances connected with their increase called for explanation, as suggested in the case cited, the explanation made by the carrier, in the absence of anything to discredit it, must be held to sustain the advance as against any presumption that it was unreasonable, and therefore there was nothing substantial to support its condemnation. Nor is there anything of substance to sustain the reduction of the Montgomery rates except the fact that they exceeded the former combination on Mobile and Pensacola. Outside of these facts, having regard to the undisputed evidence adduced at the hearing, the existing rates were not shown to be unjust or unreasonable, and there was therefore no valid basis for the commission's conclusion.

And the petitioner is therefore entitled to a decree annulling the order.

Mack, judge, dissents.

Q. (By Mr. Manager STERLING.) You had some further negotiation with Mr. Warriner, of the Lehigh Valley Co., did you not?—A. I went to see him once after that; yes.

Q. And you talked to him then about the coal-land transaction, did you not?—A. Well, hardly that.

Q. You tried to sell to him the Everhart interest in 800 acres of land?—A. Absolutely not.

Q. You talked with him about it?—A. No; I will go into that if you desire.

Q. Did you talk with Warriner about the Everhart interest in 800 acres of land?—A. The Lehigh Valley——

Q. Did you talk with him about it?—A. About the interest of what?

Q. About purchasing the Everhart interest in 800 acres?—A. No; not the way you put it.

Q. In what way did you talk with him about it?—A. The Everharts had leased two pieces of property to the Lehigh Valley Coal Co.

Q. No; I am not asking you for facts. I am asking you what was said to Mr. Warriner?—A. I can not tell you what was said without giving the facts about what was said.

Q. Just state the substance of the conversation that you had with Warriner about that.—A. I spoke to Mr. Warriner about the Lehigh Valley leases, the one with regard to 400 acres, which, I think, was known as the 1884 lease, and the one with regard to 800 acres, which was known as the 1888 lease. In the 1888 lease the Lehigh Valley Coal Co. had bought out——

Q. Did you tell him that?—A. That is what we were talking about.

Q. Go ahead and state the conversation.—A. I had to refer to something as the basis of the conversation. The Lehigh Valley Coal Co. had bought out all but one of the Everhart heirs—Mrs. Llewellyn, of Philadelphia—and, according to my information, they had endeavored to negotiate a sale from her for a definite price, the same they had paid the others, $100,000, and they had not been able to effect it.

Mr. CULBERSON. Mr. President, before we pass from the Bruce argument I desire to ask another question.

The PRESIDENT pro tempore. The Senator from Texas propounds a question which will be read to the witness by the Secretary.

The Secretary read as follows:

In one of your letters you say that the opinion in the Bruce case reflected the argument of Mr. Bruce. What argument did you refer to, the oral argument or the private-letter argument? What effect did this last argument have upon you?

The WITNESS. I referred entirely to the oral argument and to the printed brief which was submitted at that time. It was certainly a very fine argument and a very fine brief. That statement had nothing whatever to do with what was contained in the answer to my letter of the 10th of January. That letter had no effect, absolutely none, upon the decision of the case.

Mr. CULBERSON. What did you write it for, then?

The WITNESS. I wrote it on account of——

The PRESIDENT pro tempore. The Senator must submit his question in writing.

Mr. CULBERSON. Since I am handicapped in the examination I will take the liberty of asking the manager to put the question, if I may be permitted.

Mr. Manager STERLING. I will ask it. [To the witness:] Just answer the Senator's question. What did you write it for if it did not have any effect?

The WITNESS. It simply was, as you might say, to meet the argument that had been made by Judge Mack with regard to what are known as variations from the Cooley award. Judge Mack was assuming the position of dissent, and that was one matter that he raised. It only enters incidentally into the decision of the case, very incidentally. It was simply to get his views. It was something that had arisen entirely outside of the argument, and, as I said, the case could have been disposed of entirely without reference to that. But in writing the opinion it was deemed necessary to cover that point. That point was covered. As I said, I did not write that part of the opinion any more than I wrote the part in regard to the testimony of Mr. Compton.

Q. (By Mr. Manager STERLING.) Judge, you did use it for the purposes for which you got it? You used it to meet Judge Mack's views, did you not? You say you got it to meet Judge Mack's argument and you used it for that purpose?—A. I do not remember that I did. I do not remember that I discussed the matter with Judge Mack at all.

Q. You did not use it for the purpose for which you got it, you say?—A. I do not think I did.

Q. Did you tell Judge Mack you had this correspondence with Bruce?—A. No.

Mr. REED. Mr. President, I send a question to the desk.

The PRESIDENT pro tempore. The Senator from Missouri propounds a question, which will be submitted to the witness by the Secretary.

The Secretary read as follows:

Why did you not give the attorneys on the other side a chance to present their views?

The WITNESS. Because the point in the case amounted to so very little. It did not enter into the decision of the case practically at all. It was not a controlling question. It merely came up incidentally.

Q. (By Mr. Manager STERLING.) If it was so insignificant why did you take the trouble to write to Bruce about it? It was as important to the other side of the case as it was to Bruce's side of the case, was it not?—A. Yes; it was just as important to one side of the case as to the other.

Mr. NELSON. I present the following question.

The PRESIDENT pro tempore. The Senator from Minnesota propounds a question, which will be submitted to the witness by the Secretary.

The Secretary read as follows:

You set out to write an opinion in favor of the railroad company and you wanted Mr. Bruce to fortify you in this, did you not?

The WITNESS. No; I do not think that what I did could be characterized that way.

Mr. REED. I should like to ask another question.

The PRESIDENT pro tempore. The Senator from Missouri submits a question, which will be propounded to the witness by the Secretary.

The Secretary read as follows:

How would you characterize it?

The WITNESS. I can go into a full explanation. I do not think I can answer that question in a word. As I have said, so far as the first letter was concerned the position taken in the opinion entirely disregards the suggestions of that letter with regard to the testimony of Mr. Compton, and so far as the second letter is concerned with regard to the variations from what are known as the Cooley award, that matter is dealt with in that part of the opinion by Judge Knapp.

Mr. CULBERSON. Mr. President, I have a question to propound on the same subject.

The PRESIDENT pro tempore. The Senator from Texas propounds a question, which will be submitted to the witness.

The Secretary read as follows:

Why did you not give the Bruce letters to your associates on the bench?

The WITNESS. Because, as I said, they practically did not enter into the decision of the case or control or influence the decision in the case.

Mr. REED. I send the following question to the desk.

The PRESIDENT pro tempore. The Senator from Missouri propounds a question, which will be submitted to the witness.

The Secretary read as follows:

If the information you requested was immaterial, why did you request it?

The WITNESS. It seemed to be material at the time, but it did not prove so in the end.

Mr. SMITH of Georgia. Mr. President, I submit a question.

The PRESIDENT pro tempore. The Senator from Georgia submits a question, which will be propounded to the witness by the Secretary.

The Secretary read as follows:

Did you obtain the aid of Mr. Bruce to prepare a dissenting opinion, and, after obtaining his aid, bring the majority of the court over to your view of the case without disclosing the fact either to opposing counsel or the court that you had been corresponding with Mr. Bruce?

The WITNESS. I wrote the dissenting opinion, which I did solely upon my own views and study of the case. Certainly I did not write that dissenting opinion with any conference with Mr. Bruce or any correspondence, except just the one letter, which has been put in evidence. I had reached a conclusion with regard to the testimony of Mr. Compton the same as Mr. Bruce speaks of in his letter. With regard to that, I simply wanted a confirmation of that view. As I said, it is a very inconsiderable point in the case, only one of very many.

Mr. REED. Mr. President, I send to the desk a question.

The PRESIDENT pro tempore. The Senator from Missouri submits a question, which will be propounded the witness by the Secretary.

The Secretary read as follows:

When did you conclude that the information you sought from Mr. Bruce was immaterial?

The WITNESS. In talking the matter over with Judge Knapp I saw that there was no occasion to dwell upon that point of the case. The time, really, when Judge Knapp and I talked the matter over, after it had been decided that we would render a decree in favor of the Louisville & Nashville Railroad——

Mr. SHIVELY. Mr. President, I send a question to the desk.

The PRESIDENT pro tempore. The Senator from Indiana propounds a question, which will be submitted to the witness by the Secretary.

The Secretary read as follows:

Was it after you received the letter from Mr. Bruce that the dissenting opinion which you prepared became in substance the opinion of the court?

The WITNESS. It was after the first letter which I received, along in the summer of 1911, that my dissenting opinion, or the substance, became the basis of the opinion of the court.

Mr. JONES. Mr. President, I submit a question.

The PRESIDENT pro tempore. The Senator from Washington submits a question, which will be propounded to the witness by the Secretary.

The Secretary read as follows:

If the information sought seemed material when you asked for it, did it not occur to you to advise other counsel or your associates of your desire to secure it?

The WITNESS. It did not, or I should have done so.

Mr. POMERENE. Mr. President, I submit a question.

The PRESIDENT pro tempore. The Senator from Ohio submits a question which will be propounded to the witness.

The Secretary read as follows:

If it was such an inconsiderable point about which you wrote to Mr. Bruce, why was it necessary to meet the views of Judge Mack on this point?

The WITNESS. Well, when there is one member of the court sustaining a certain line of views they become the subject of discussion very naturally and necessarily. I never regarded, if I may be permitted to say so here, that the point upon which Judge Knapp eventually dissented really was of any significance in the case. I am characterizing the opinion of my associate in a way in which I would not do except for the question. It was necessary to say that in order to answer the question.

I should like very much, if I could be permitted, to explain this whole thing, because I feel satisfied that if I could it would show the Senate more fully what I have endeavored to show in answer to these questions.

Mr. REED. Mr. President, I send a question to the desk.

The PRESIDENT pro tempore. The Senator from Missouri propounds a question which will be submitted to the witness by the Secretary.

The Secretary read as follows:

Did you communicate to your associates in argument the views set forth in the Bruce letters?

The WITNESS. No; those were the arguments with regard to the Cooley award, which was the matter spoken of in the letter of January 10. Those were advanced in answer to Judge Mack by Judge Knapp, without reference to anything that appeared in my letter or without any suggestion on my part. They were the natural and obvious answer, as it seemed to me, to the position taken by Judge Mack.

Mr. REED. Mr. President, the witness said he desired to explain my question. My question is directed to that request.

Mr. POMERENE. I have a question, and it was directed to the same point.

The WITNESS. I will be as brief as I possibly can. The questions involved in the Louisville & Nashville case were the reduction of class rates which had been ordered by the Interstate Commerce Commission from New Orleans to Mobile and Pensacola, and through Mobile and Pensacola to Montgomery and beyond. Those rates, so far as the rates from New Orleans to Mobile and Pensacola are concerned, had been established, as it was claimed by water competition, at a very low point by the railroads.

The rate from New Orleans to Montgomery would ordinarily be made up by the rates from New Orleans to Mobile or to Pensacola plus the rates from either of those two places to Montgomery and beyond. It so happened—and this was the complaint against the rates of the railroad—that the through rate from New Orleans to Montgomery was greater than the combination on those two places or than the sum of the locals. That complaint having been made to the commission, the railroad company then raised its rates to the intermediate points, so that the sum of the locals would equal the through rate to Montgomery.

It was that controversy in that case that came up before the Commerce Court. The main contention before the Commerce Court—the one controlling contention—was that the Interstate Commerce Commission had no evidence before it—not evidence on which there might be a difference of views, but practically no evidence—to sustain the conclusions which they had reached, which were involved in the decision of that question and that case, and also that they not only had no evidence, but that they had mistaken the evidence. On the part of the Government and the Interstate Commerce Commission it was contended that the court was not authorized to go into that question at all. That was the position assumed by them, and was their main contention.

The view that I took originally with regard to that was in line with the argument made by Mr. Bruce at the time the case was originally made, that there was practically no evidence to justify the conclusion of the Interstate Commerce Commission. The Interstate Commerce Commission in the opinion which they rendered—a copy of which I have here in my hand and which I should like to go into the RECORD—gave sundry reasons for this decision. There were two matters in that opinion about which the two letters written to Mr. Bruce are concerned, and I will refer to them in their order. I should like to read this extract from the opinion of the Interstate Commerce Commission at this point, bearing in mind that the question for us to decide, the contention on the part of the railroad company that there was no evidence—substantially no evidence—a conclusion which was finally reached in the opinion of the majority of the court. This is the extract:

It was stated by the principal witness—

This is one of the reasons, and the only reason, given by the Interstate Commerce Commission for the order which they made—

It was stated by the principal witness for the defendant that between points on its line where the through rate exceeded the combination of rates from point of origin to a competitive point, and from said competitive point to destination, shippers were given the benefit of the combination rate, and this provision appeared in several circulars and was very generally observed, as a rule, for the adjustment of freight rates; and such having been formerly the custom of the defendant, it would seem now to work no especial hardship upon it to reduce rates to the basis of the former combination.

That is to say, it is asserted in that opinion that there existed a rule with respect to the rates involved in the controversy in that case, by which parties shipping from New Orleans to Montgomery would be given the benefit of the combination and reduced in that way on through rates. As a matter of fact, there is not anything in the opinion that sustains that view; that is to say, that was the view which I took in my dissenting opinion, and that is the view that was taken eventually in the opinion of the court; but regardless of that conclusion, here is what the court said upon that point in its opinion——

Mr. WORTHINGTON. The Commerce Court?

The WITNESS. The Commerce Court.

It is undoubtedly true—

Now, this, mind you, was written by Judge Knapp—

It is undoubtedly true, as testified by Mr. Compton—

He was the witness spoken of here as "the principal witness," the traffic manager, I believe, he was, of the Louisville & Nashville Railroad—

It is undoubtedly true, as testified by Mr. Compton, that it was a more or less general practice to protect through shipments against the combination of locals, and a rule to that effect was carried by his road in certain of its local tariffs; but there was no such rule in the tariffs naming rates to Montgomery territory, and nothing whatever appeared at the hearing to indicate that through traffic to Montgomery was ever carried at less than the Montgomery rate. A colloquy occurred in the course of Mr. Compton's examination, in which he seems to have admitted that the rule in the local tariffs referred to, not being limited in terms, might be claimed to have authorized the application of the Mobile combination to Montgomery shipments. But the point is not what those tariffs might have been considered to mean, but what the actual practice was in respect to the traffic in question. Evidently the road was always careful to maintain this Montgomery rate.

I wrote my dissenting opinion. In looking over the testimony, of which I made the abstracts which I have here in my hand—a very voluminous record—I reached the conclusion with regard to Mr. Compton's testimony contrary to that which appeared in the opinion of the Interstate Commerce Commission. I wanted to make sure about that, and I wrote the letter which I have written, the first letter, to Mr. Bruce, to ascertain whether the view which I took of that, which depended upon whether the word "not" had or had not been omitted, was correct; and he sustained me in that view; but as I read the opinion as it is now formulated, that matter was put entirely aside, and it was assumed that what Mr. Compton had said was what the Interstate Commerce Commission say that he said, because, reading again, I find this:

A colloquy occurred in the course of Mr. Compton's examination in which he seems to have admitted—

It seems to me Mr. Compton did admit—

that the rule in the local tariffs referred to, not being limited in terms, might be claimed to have authorized the application of the Mobile combination to Montgomery shipments.

Then he goes on to point out that, notwithstanding that fact, the conclusion reached by the commission upon that point was not correct. That is what was embodied in the first letter.

The second letter goes to this part of the opinion of the Interstate Commerce Commission. The whole basis of rates into the southeastern territory by all the railroads running in that direction, covering the rates from what was known as the Mississippi and Ohio River crossing points down into that territory, including the rate from New Orleans into Montgomery territory, had been originally submitted to arbitration by the carriers. Judge Cooley, the first president of the Interstate Commerce Commission, was the arbitrator. As the result of that he established a relation of rates into that territory. That arbitration had stood, according to the contention on the part of the Louisville & Nashville Railroad, from that time, away back in 1886, until the controversy arose, which, I believe, was in 1907, a long period of years; and that, in view of that fact, that arbitration was entitled to particular consideration at the hands of the Interstate Commerce Commission in reaching the result; and that, in disregard of it, they had put it aside as being nothing more than what might be said of historical value.

This is part of the Interstate Commerce Commission's opinion to which that refers:

The Cooley arbitration in 1886 has been strongly urged by the defendant as a reason for the nonreduction of the present advanced rates. This arbitration established a relation of rates as between the several Ohio and Mississippi River crossings applying upon products from the territory north and west of those rivers destined to the southern and southeastern territory by fixing a basis for making rates from these several basing points to the southeastern territory, with the object of maintaining an equitable relation and equality of the basing rate as between said points on goods transported to southeastern territory, but we do not understand that this arbitration undertook to fix the actual rates for carriage from the several basing points to destinations in this territory.

Here is the significant part:

However, if such were the case, the building of new railroads, competition, and other causes forced many departures from the adjustment and the rates made under it, until it has become materially altered, and it is inevitable and proper that it should yield to meet new and changed conditions.

In other words, the reason given by the Interstate Commerce Commission for disregarding the Cooley award was the suggestion that there had been so many departures from it. That was the position taken also by Judge Mack based upon this: There are class rates and commodity rates. The difference between them I endeavored to explain yesterday. There is a classification of freight, running from first class to sixth class, and some lettered classes. I do not know what enters into that matter, and it is not material.

Then there are commodity rates; that is to say, a lot of commodities grouped together to form a class are put in a class because they have certain relations to each other; but for some reason or other one of these commodities will be taken out of a class and given a specific rate. Those are the commodity rates.

When this matter originated before the Interstate Commerce Commission both class rates and commodity rates were involved; but as a result of that the railroads made the changes in the commodity rates of which complaint was made, so that there was nothing left in the controversy except with regard to class rates; but the position taken by Judge Mack was—and apparently the only justification for the position taken by the Interstate Commerce Commission in that part of the opinion which I have read was—that there had been a variation from the Cooley award in commodity rates which were not involved. Judge Mack examined the tariffs at great length and reported that he found I do not know how many variations in the commodity rates, and he said that justified the statement of the Interstate Commerce Commission which I have particularly referred to:

However—

Reading from the opinion—

However, if such were the case, the building of new railroads, competition, and other causes forced many departures from the adjustment and the rates made under it, until it has become materially altered, etc.

What was said in that opinion related, as I understood and as every one of the members of the court understood, really to class rates, which was the only question involved in the case before the Commerce Court. The matter set up by Judge Mack was that there had been variations in the commodity rates and that that justified the statement. That is the whole issue that there was; and that is the whole question that was referred to in the letter to Mr. Bruce. It only incidentally enters into the result, because it only bears upon one of the reasons that the Interstate Commerce Commission gave for its opinion. It might have been entirely disregarded and the result reached be practically the same as it was. As I have said, I think that is reflected entirely in the opinion where the matter of the Cooley award is treated. The obvious answer is that you can not base a variation from the Cooley award on commodity rates as bearing upon whether there had been a variation from the Cooley award with regard to class rates.

That is all there is to it; that is what is said in the opinion; and, as I have said, that view is the view that was advanced by Judge Knapp and coincided in by the rest of the court, and is what appears in the opinion. I had no more influence in bringing about that view than other members of the court; and the views that were advanced by Mr. Bruce in his letter were not communicated to the other members of the court. It seemed to me that it was only in justice to Mr. Bruce, this question having been raised entirely outside of the record and not in the argument at all, that if it had any bearing, as I do not think it had in the practical result, he was entitled to have the views that he expressed appear there.

The PRESIDENT pro tempore. The Senator from Missouri [Mr. REED] submits a question which he desires propounded to the witness. The Secretary will read the question.

The Secretary read as follows:

Do you as a judge consider it a safe practice to ask the lawyer interested in a particular construction of evidence for his views without giving the opposing attorney a chance to be heard?

The WITNESS. I wish to say emphatically no, coinciding entirely with the view which I consider to be expressed in the opinion. There may be circumstances which might justify that, but it certainly would be very unusual; and I have tried to follow that as a cardinal rule in all my practice and all my experience upon the bench.

The PRESIDENT pro tempore. The Senator from Idaho [Mr. PERKY] propounds a question, which will be read to the witness.

The Secretary read as follows:

In your answer to article 4 of the articles of impeachment exhibited against you, you admit that you requested Mr. Bruce to see one of the witnesses in order to get the witness's explanation of a phase of his testimony. Do you regard this procedure as fair to the opposing side? Does such confidence not invite and encourage imposition?

The WITNESS. Well, my views now, with the light that has been thrown upon the subject, might vary from what they were at the time. I think I may say frankly that if I had supposed there was any unfairness or even any impropriety, my judicial sense and my sense of propriety would have kept me from that. If it seems otherwise to Senators, I regret it; but that is all I can say. It did not seem to me, it did not impress me, in the way that has been suggested here.

Mr. CULBERSON. Mr. President, I submit a question which I desire to have propounded to the witness.

The PRESIDENT pro tempore. The Senator from Texas submits a question, which will be read to the witness by the Secretary.

The Secretary read as follows:

As you condemn the reprehensible practice involved in the Bruce correspondence, as I understand you, what explanation of it or excuse for it have you to make to the Senate? State it fully and frankly.

The WITNESS. I do not think that what I have said constitutes or is intended to constitute an admission that, under the circumstances of this case and under the conditions which existed, the practice was reprehensible. I may be obdurate in that opinion. So far as that seems to have been a practice that was reprehensible, or not to be commended by the Senate, I have no further excuse or no further explanation than that which I have endeavored already to give.

The PRESIDENT pro tempore. The managers will proceed with the examination.

Q. (By Mr. Manager STERLING.) Going back to article 6, Judge, you did have a talk with Warriner about the Everhart interest in this 800-acre tract?—A. Yes.

Q. And the purpose of it was to get him to buy their interest in that tract?—A. No.

Q. Well, what was said?—A. He was anxious to buy that interest.

Q. What was said between you and him?—A. I knew, or I understood, that he was anxious to buy that interest. I did not have it to sell, but I understood that Mr. Dainty was on friendly relations with Mrs. Llewellyn, controlling the outstanding interest, and that he possibly could secure that interest for the Lehigh Valley Railroad Co. That was what he represented.

Q. What Dainty represented to you?—A. What Dainty represented; yes.

Q. Then did you have him go to see the Everhart interests?—A. No; I did not.

Q. Well, did he go to see them?—A. I do not know.

Q. You and Dainty were connected in the matter, were you not?—A. No.

Q. Why did Warriner then come to you about it, or why did you go to him?—A. He did not come to me.

Q. Did you go to him?—A. I went there and saw him at his office.

Q. Why did you go and see him about it if you were not concerned in it?—A. Simply as a matter that affected Mr. Dainty; so far as it affected Mr. Dainty.

Q. Then you and Dainty were connected in a way with it, were you not?—A. We were connected in the way I have described.

Q. You went just as a friend of Dainty?—A. Practically that.

Q. Was there not an understanding between you and Dainty that you and he were to get the Everhart interest for sale, sell it to the Lehigh Valley Co., and get a commission on it?—A. Absolutely not.

Q. Well, at the same time you talked to Warriner about that, you also talked to him about leasing another tract of 320 acres to Dainty, did you not?—A. Yes; that was the suggestion——

Q. You tried to get from Warriner a lease for Dainty on that, did you not?—A. I suggested that if Mr. Dainty was instrumental in securing the Llewellyn interest for the price which they named—Mr. Warriner said they would absolutely pay nothing but the $100,000; indeed, he said they would deduct the royalties that had been paid to Mrs. Llewellyn, since the other heirs had been bought up, because we did not propose to make any difference or any distinction between her and the others—I suggested that if Mr. Dainty did that, then he would like to lease the Morris & Essex tract.

Q. Did anything come of that conference with Warriner about those two matters?—A. No.

Q. They neither bought the Everhart interest nor rented to Dainty through you the 320-acre tract?—A. No.

Q. How long had you known Dainty?—A. Oh, I had known of him longer than I had actually met him. I had not met him very long before this occurred.

Q. Well, Williams brought him to you, did he not?—A. Yes.

Q. And introduced him to you?—A. I met him and Williams on the street one day.

Q. Did he not come to your office with Williams?—A. He did.

Q. This was just shortly before your conference with Warriner?—A. Yes; not long.

Q. Williams told you what Dainty wanted; but he said to you that he had not told Dainty that you were the only man in Scranton that could get these interests from the railroad company?—A. No; that is not so.

Q. Well, what did he say about that?—A. Mr. Dainty did the talking.

Q. What did Williams say when he introduced Dainty?—A. Mr. Williams brought Mr. Dainty there with the suggestion that he would be able to get the Everhart interest in the Katydid dump.

Q. How were you interested in that? Did Williams know you were trying to get those interests for sale?—A. That was during the negotiations that we were carrying on with regard to the Katydid dump.

Q. Well, how did that bring up the matter of the Everhart interest in the 800-acre tract?—A. I presume Mr. Dainty mentioned that fact; he must have mentioned it.

Q. That was the purpose Williams had in bringing Dainty there—so you could talk about that?

Mr. WORTHINGTON. I object to asking the witness what Mr. Williams's purpose was.

Mr. Manager STERLING (to the witness). Well, what did you say to Williams?

The WITNESS. I do not understand what you mean when you ask what was his purpose. I do not know what you refer to.

Q. Williams brought Dainty to you, so that Dainty could get you to intercede for him with the railroad company with reference to these two matters?—A. Oh, no; there was nothing suggested like that.

Q. That is what you talked about, was it not?—A. No; that is not what we principally talked about.

Q. Well, you did talk about it?—A. No.

Q. Not at all?—A. Not further than what I have suggested.

Q. Well, you did talk about it, then, to that extent?—A. Yes.

Q. As the result of that you went to Warriner to see what you could do for Dainty in that regard?—A. I went to Mr. Warriner and made a suggestion to Mr. Warriner that Mr. Dainty thought he could get the Llewellyn interest.

Q. And you asked him if he would rent Dainty this 320 acres of land?—A. I suggested, as I have said, that Mr. Dainty would like, if he succeeded in doing that, to get a lease on the Morris & Essex tract.

Q. Why did you do that, Judge?—A. As a matter of friendliness.

Q. To Dainty?—A. Yes.

Q. You had never met him before?—A. Oh, yes; I had.

Q. Was there any express understanding between you and Dainty that you were to share in the commission for the sale of the Everhart interest and in the profits of the lease which Dainty was to get for the 320 acres?—A. Absolutely not.

Q. Now, Judge, you did not know about the contribution by members of the bar until you got on board the ship, did you?—A. I did not.

Q. And you received it in a package with the letter about which you testified yesterday?—A. Yes.

Q. After you arrived in Europe you sat down and wrote to the contributors thanking them for it?—A. Yes.

Q. How did you know who the contributors were?—A. I did not know, except as their names appear.

Q. In this letter?—A. Well, there were others whose names are not in that letter.

Q. In this letter, marked "Exhibit UU"?—A. There were three others whose names are not in that letter.

Q. Where did you get those names?—A. After I got to Italy I received a letter from Mr. Searle, in which he communicated the fact that there had been additional contributions made by three members of the bar of Luzerne County, at Wilkes-Barre—Judge Wheaton, Mr. Woodward, and Mr. Lenahan—and he wanted to know whether he should forward that money to me. I told him no; that he should keep that until I got home.

Q. How much was there of that?—A. $125.

Q. Was that in addition to the $525 contained in the package?—A. It was.

Q. And where is that letter which you got from Searle?—A. I really do not know.

Q. I see you have indorsed this letter on the back for filing away to keep it, so that you could remember the names of the contributors, I presume?—A. I filed it away; yes. I preserved it.

Q. Why did you not preserve the other one in the same way, so that you could remember the other gentlemen?—A. I think I have.

Q. Why did you not bring it with you?—A. I did not think about it.

Q. Did you not think about that when you thought about this?—A. I beg pardon.

Q. Did you not think about that when you thought about this?—A. No; I did not. This was the particular characterization of the gift.

Q. When you got back, Mr. Searle gave you the $125, did he?—A. Yes.

Q. Making a total of $650?—A. Yes.

Q. How many times did you go to Warriner with reference to the Dainty transactions?—A. Once.

Q. Do you think Mr. Warriner was mistaken when he said you saw him more than once?—A. I do not remember what his testimony is. I would not be positive that I was limited to one time.

Q. Do you think Warriner was mistaken when he said you approached him with reference to that matter?—A. Well, I do not want to put my testimony in comparison with his or that of anyone else. I have only given you my remembrance.

Q. Do you remember he said that a year before that the road had contemplated purchasing that interest, but that they had not considered it lately?—A. I can not tell you about his testimony. I have given you mine.

Q. On yesterday you were asked about addressing these letters to the railroad companies on the Commerce Court paper. I believe you said then you had not any other paper?—A. I think that the paper that I had been using as district judge ran very low about that time. I believe some of the letters that I wrote were on district judge paper.

Q. Did you not have any blank paper?—A. I think there was some blank paper that was used in case of a letter going over one page.

Q. Did it occur to you that it would look better and be in better taste to write these railroad companies in reference to these business transactions on other paper?—A. It might have been better taste.

Q. Do you think you would have done it if you had had other paper there?—A. I could not tell you that.

Q. You did have other paper there, I presume, because in these letters where you have used more than one sheet the second sheet is always blank paper?—A. I think that is true.

Q. And that is the form in which the Commerce Court paper comes to the members, is it not?—A. No, not unless you ask especially for it; but I have special blank paper.

Q. You have it?—A. Yes. The form that that assumes, of course, is largely the result of the typewriting of my stenographer. I dictated a letter, and it was taken off and put on paper and I signed it.

Q. Let me ask you this. Have you noticed, Judge, in your correspondence which is in evidence in this case that in every instance where you addressed railroad companies or the officials of railroad companies concerning their coal properties and with reference to the negotiations which you were having with them, you used paper with letterheads "Commerce Court" on it, and that in all cases where you used blank paper it was correspondence not with railroad companies? Have you noticed that?—A. I have not.

Q. Did it occur to you at any time, Judge, that it would help to impress the railroad companies with the idea that you had jurisdiction over them in the Commerce Court?—A. It did not, Mr. STERLING.

Mr. Manager STERLING. That is all.

The PRESIDENT pro tempore. Are there any further questions?

Mr. SIMPSON. Yes, sir.

Redirect examination:

Q. (By Mr. SIMPSON.) In the course of your testimony in relation to Article I you said that as you recollected it, the price agreed upon with the Hillside Coal & Iron Co. for the Katydid dump was agreed upon in September. Do you recall a letter of August 30, 1911, page 139, referring to that matter?—A. That was the time. There was but one time. That was when Mr. Williams went to see Capt. May as a result of my meeting Capt. May in the street.

Q. You were asked also whether you saw anybody else than officials of the railroad company in relation to the purchase of the Katydid culm-dump matter. Do you recall the interviews had with Mr. Robertson and the papers that were drawn in relation to that?—A. Oh, yes; of course that occurred.

Q. That was in relation to this identical matter?—A. Yes; certainly; that was in relation to Mr. Robertson's interest, which was a very important part.

Q. The question was asked you by Mr. STERLING as to whether or not Capt. May knew that you had an interest in the Katydid transaction. Will you tell us, please, whether you ever told him that you had a financial interest in it?—A. I do not remember speaking about that. Oh, yes; I think I did. I think I wrote a letter when I asked him to keep the price confidential.

Q. That is one of the later letters that is in evidence in this case.—A. Yes; it is in evidence. At that time I was trying to secure the Brooke's property, the Birdsboro people's interest.

Q. I notice that in the agreement, or draft of an agreement, which was drawn by you between yourself and Mr. Williams and the Laurel line, there appears a clause that "the parties of the first part"—that is yourself and Mr. Williams—"do hereby grant, bargain, sell, and convey unto the parties of the second part, their successors, assigns, and so forth, all of the culm dump," and so forth. You were asked by Mr. STERLING whether or not there was any warranty in the agreement. Do you remember the Pennsylvania act of assembly which deals with those words, "grant, bargain, and sell"?—A. They are held to create a warranty.

Q. It is the act of 1705, is it not?—A. It is.

Q. You were also asked by Mr. STERLING whether or not your name appeared as a party interested, except in one letter, which was written by you to Mr. Conn. I find there are two letters in the record, one dated September 20, 1911, being Exhibit No. 10, page 184, and one dated November 6, 1911, being Exhibit No. 3, page 143. Your name appears as a party interested in both of those letters, does it not?—A. I can not speak except as the exhibit itself speaks.

Q. You would not undertake to say that if the exhibit shows that fact that it appeared only in one letter?—A. No; I do not pretend to contradict the exhibits.

Q. Do you remember what time of day you wrote the letter of October 3, 1911, to Mr. Loomis from Washington?—A. No; I do not.

Q. Do you remember what time of day it was mailed?—A. No; I do not.

Q. Can you tell us how long it takes a letter to go from Washington to Scranton?—A. If mailed in the afternoon of one day it will appear, I think, in Scranton about 11 o'clock. If it is put in the mail later than that in the day, it will not reach Scranton until about 4 in the afternoon of the following day.

Q. If a letter is put in the box in the morning of one day, what time would it reach Scranton?—A. It is not likely to reach Scranton until the following day.

Q. Then your letter of October 3, 1911, mailed from Washington, could not have reached Scranton until the 4th of October at the earliest?—A. No.

Q. And would hardly be the means of fixing a date of meeting on the 5th. My colleague calls my attention to the fact that this letter was sent to Mr. Loomis in New York. What time would it reach New York?—A. I do not know anything about the mails between here and New York, but I imagine they are very much more speedy than they are between here and Scranton.

Q. Would a letter mailed here at an ordinary hour, say after 10 o'clock, on one day, reach New York and be delivered before the next day?—A. I do not think it would. It is five full hours by the fastest train from here to New York.

Q. It was hardly likely, then, that that letter mailed to New York on the 3d of October would have reached New York in time to fix an interview in Scranton with parties that were to leave New York and be in Scranton on the 5th?—A. Well, I would want to consider that, Mr. Simpson, before I answered, sir.

Q. Will you tell us, please, whether or not you ever gave instructions to your stenographer and typewriter as to what paper she should use in writing letters for you?—A. No; I did not particularly.

Q. You say "particularly." I do not know quite what that means.—A. I never gave her any directions at all about it. I dictated a letter and when it came to me I signed it. I did not notice what paper it was on.

Q. Did you ever give her any instructions as to letters to be written to railroads or corporations any differently from letters to be written to anybody else?—A. No.

Mr. SIMPSON. I believe that is all, Mr. President.

The PRESIDENT pro tempore. Are there any further questions to be asked the witness?

Mr. Manager STERLING. There is nothing further of this witness, Mr. President.

Mr. SIMPSON. I offer in evidence, Mr. President, a transcript of the docket entries of the Commerce Court in the Louisville & Nashville Railroad Co. case.

Mr. Manager WEBB. We have no objection.

The transcript referred to is as follows:

[U. S. S. Exhibit VV.]

TRANSCRIPT OF DOCKET ENTRIES, UNITED STATES COMMERCE COURT.

(Docket No. 4.)

PARTIES.

Louisville & Nashville Railroad Co., petitioner, *v.* The Interstate Commerce Commission, respondent.

INTERVENERS.

The United States.

ATTORNEYS.

For petitioner: Helm Bruce, W. G. Dearing.
For United States: James A. Fowler, Blackburn Esterline.
For Interstate Commerce Commission: William E. Lamb.

PROCEEDINGS.

1910.

January 26. Filing three bills in equity (U. S. Circuit Court, Western District of Kentucky, equity No. 7223). Filing three exhibits. Certificate of Attorney General filed. Making three copies of certificate for circuit judges at request of Attorney General. Attaching certificate and seal to each. Subpœna in chancery issued to March rules, 1910. Making copy of do. for service.
February 11. Order setting cause for hearing February 25.
February 19. Answer filed.
February 21. Motion for interlocutory injunction heard in part. Order filing affidavits of H. B. Biddle and four others. Replication filed.
February 22. Motion for interlocutory injunction further heard. Affidavit of Lincoln Green filed.
February 23. Motion for interlocutory injunction concluded.
April 9. Ordered that judges sitting in chambers be adjourned to session in court. Opinion filed. Order overruling motion for injunction.
May 17. Order appointing Clarence E. Walker examiner. Filing stipulation.
June 16. Petition of intervention of Cincinnati, New Orleans & Texas Pacific Railway Co. and others tendered; motion to file; and order overruling motion. Entering exceptions.

1911.

January 30. Order filing stipulation.
February 13. Stipulation filed.
February 15. Transferred to United States Commerce Court from United States Circuit Court for Western District of Kentucky, equity No. 7223.
February 24. Brief for petitioner filed.
April 3. Ordered that United States be permitted to intervene, and original answer of Interstate Commerce Commission adopted.
April 4. Brief for the United States filed.
April 5. Cause taken under advisement.
April 11. Brief for Interstate Commerce Commission filed.
April 17. Reply brief for complainant filed.

1912.

February 28. Opinion annulling order of Interstate Commerce Commission filed.
March 7. Final decree, in accordance with opinion, entered.
March 12. Dissenting opinion of Judge Mack filed.
March 16. Petition for appeal filed. Assignment of errors filed. Order allowing appeal filed. Præcipe for record filed.
March 23. Order entered directing clerk to transmit originals of certain papers to Supreme Court.
A true copy.
Test.
[SEAL.]

G. F. SNYDER,
Clerk of the United States Commerce Court,
By W. S. HINMAN,
Deputy Clerk.

Mr. SIMPSON. I offer in evidence a transcript of the docket entries in the so-called Lighterage case, No. 38.

The transcript referred to is as follows:

[U. S. S. Exhibit WW.]

TRANSCRIPT OF DOCKET ENTRIES, UNITED STATES COMMERCE COURT.

(Docket No. 38.)

PARTIES.

The Baltimore & Ohio Railroad Co., The Central Railroad Co. of New Jersey, The Delaware, Lackawanna & Western Railroad Co., Erie Railroad Co., Lehigh Valley Railroad Co., New York, Ontario & Western Railway Co., and The Pennsylvania Railroad Co., petitioners, *v.* United States, respondent.

INTERVENERS.

Brooklyn Eastern District Terminal, John Arbuckle, and William A. Jamison, intervening petitioners. Interstate Commerce Commission, Federal Sugar Refining Co., intervening respondents.

ATTORNEYS.

For petitioners: Hugh L. Bond, Jackson E. Reynolds, W. S. Jenney, George F. Brownell, J. F. Schaperkotter, John B. Kerr, George Stuart Patterson, H. A. Taylor.
For United States: James A. Fowler, Blackburn Esterline.
For Interstate Commerce Commission: P. J. Farrell.
For Brooklyn Eastern District Terminal: Parsons, Closson & McIlvaine, Woodhull Hay.
For John Arbuckle and William A. Jamison: Dykman, Oeland & Kuhn.
For Federal Sugar Refining Co.: Ernest A. Bigelow.

PROCEEDINGS.

1911.

April 12. Petition for injunction, etc., filed.
April 13. Copy of petition filed in office of secretary of Interstate Commerce Commission and in Department of Justice.
April 19. Petition of Federal Sugar Refining Co. to be made a party respondent filed. Order granting petition of Federal Sugar Refining Co. filed.
May 8. Appearance of P. J. Farrell for Interstate Commerce Commission filed.
May 10. Petitioners' notice of motion and affidavits filed.
May 11. Intervening petition of Brooklyn Eastern District Terminal and notice filed. Motion of Interstate Commerce Commission and Federal Sugar Refining Co. to dismiss filed.
May 12. Affidavit of service filed by Brooklyn Eastern District Terminal. Intervening petition of John Arbuckle and William A. Jamison and notice filed. Motion of the United States to dismiss filed.
May 13. Testimony before the Interstate Commerce Commission filed.
May 17. Brief for the petitioners on motion for temporary injunction filed. Points submitted on behalf of the defendant. Federal Sugar Refining Co., filed. Order entered granting Brooklyn Eastern District Terminal leave to intervene. Order entered extending motions of United States and Interstate Commerce Commission to dismiss the petition to cover intervening petitions of Arbuckle and Jamison and Brook-

lyn Eastern District Terminal. Order entered granting John Arbuckle and William A. Jamison leave to intervene. Order entered excluding evidence taken before Interstate Commerce Commission.

May 22. Brief of United States filed. Order denying motion to dismiss. Order granting motion for temporary injunction filed.

May 23. Certified copy of order granting motion for temporary injunction served on chairman of Interstate Commerce Commission.

May 25. Brief for Jay Street Terminal and Arbuckle Bros., interveners, filed. Certified copy of order granting motion for temporary injunction served on Attorney General of United States.

June 9. Answer of Federal Sugar Refining Co. filed. Answer of the United States filed. Answer of United States to intervening petition of John Arbuckle and William A. Jamison filed. Answer of United States to intervening petition of Brooklyn Eastern District Terminal filed.

June 12. Petition for appeal filed by Interstate Commerce Commission. Assignment of errors filed by Interstate Commerce Commission.

June 13. Order entered allowing appeal. Citation on appeal of Interstate Commerce Commission filed.

June 15, 16. Certified copy of citation on appeal served on each petitioner and intervening petitioner. Petition for appeal by the United States filed. Assignment of errors by the United States filed. Order entered allowing appeal of the United States. Citation on appeal of the United States filed.

June 17, 19, 27, 28. Certified copy of citation on appeal of United States served on each petitioner and intervening petitioner.

June 26. Præcipe for transcript of record filed.

October 3. Order designating Judge Mack to hear testimony.

1912.

June 24. Mandate of United States Supreme Court affirming decree of Commerce Court filed. Notice of motion for final hearing, etc., filed. Motion of United States to vacate order for testimony heretofore entered and to set cause for final hearing, etc., filed. Objections of United States to this court taking evidence filed. Appearance of H. A. Taylor for petitioners filed. Appearance of Woodhull Hay for Brooklyn Eastern District Terminal filed. Motion of United States to vacate order for testimony, etc., denied and objections thereto sustained, order entered. Motion of petitioners to proceed to take evidence granted and objections overruled, order entered.

October 10. Order entered granting United States and Federal Sugar Refining Co. leave to withdraw answers and enter motions to dismiss. Motion of United States and Federal Sugar Refining Co. to dismiss filed.

October 19. Brief for Brooklyn Eastern District Terminal filed.

October 21. Brief for Jay Street Terminal and Arbuckle Bros., interveners, filed. Brief for petitioners on motion of respondents to dismiss petition filed. Final hearing commenced.

October 22. Final hearing concluded; cause taken under advisement.

October 23. Brief for the United States filed.

October 28. Reply of Jay Street Terminal and Arbuckle Bros. to brief for United States filed.

November 4. Reply brief for railroad companies, petitioners, on motion to dismiss filed.

November 15. Opinion on final hearing on motions to dismiss filed. Final decree entered annulling order of Interstate Commerce Commission.

November 25. Petition for appeal filed. Assignment of errors filed. Order entered allowing appeal. Præcipe for record filed.

November 29. Notice of filing of præcipe with acceptances of service thereof filed. Certified transcript to Supreme Court.

A true copy.
Test:
[SEAL.]

G. F. SNYDER,
Clerk of the United States Commerce Court.
By W. S. HINMAN,
Deputy Clerk.

Mr. SIMPSON. I offer in evidence a transcript of the docket entries in the fuel-rate case, No. 39.

The transcript referred to is as follows:

[U. S. S. Exhibit XX.]

TRANSCRIPT OF DOCKET ENTRIES, UNITED STATES COMMERCE COURT.

(Docket No. 39.)

PARTIES.

The Baltimore & Ohio Railroad Co.; the Pennsylvania Railroad Co.; the Pennsylvania Co.; Buffalo, Rochester & Pittsburgh Railway Co.; the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.; the Wheeling & Lake Erie Railroad Co., and B. A. Worthington, receiver thereof; the Lake Shore & Michigan Southern Railway Co.; the Pittsburgh & Lake Erie Railroad Co.; Buffalo & Susquehanna Railway Co.; Harry I Miller, receiver, Buffalo & Susquehanna Railway Co.; Erie Railroad Co.; the Western Maryland Railway Co.; the Pittsburgh, Shawmut & Northern Railroad Co., and Frank Sullivan Smith, receiver thereof, petitioners, *v.* United States, resopndent.

INTERVENERS.

Interstate Commerce Commission.

ATTORNEYS.

For petitioners: Hugh L. Bond, jr., George F. Brownell, George Stuart Patterson, Clyde Brown, William M. Duncan.
For United States: James A. Fowler, Blackburn Esterline.
For Interstate Commerce Commission: P. J. Farrell.

PROCEEDINGS.

1911.

April 27. Petition for injunction, etc., with exhibits, filed.

April 28. Copy of petition filed with chairman of Interstate Commerce Commission and in Department of Justice.

May 8. Appearance of P. J. Farrell for Interstate Commerce Commission filed.

May 15. Notice and motion to strike by Interstate Commerce Commission filed.

May 19. Petitioners' notice of motion and affidavits filed.

May 22. Order sustaining motion of Interstate Commerce Commission to strike out portions of petition filed.

May 23. Answer of Interstate Commerce Commission filed.

May 24. Brief for Baltimore & Ohio Railroad Co., and other petitioners filed.

May 27. Answer of United States filed.

May 29. Order entered granting application for preliminary injunction.

May 31. Temporary injunction issued in accordance with order of May 29, and served on Attorney General and chairman of Interstate Commerce Commission.

June 6. Petition for appeal filed by Interstate Commerce Commission. Assignment of errors filed by Interstate Commerce Commission. Order entered allowing appeal. Citation on appeal of Interstate Commerce Commission filed.

June 8. Certified copy of citation on appeal served on each petitioner.

June 16. Petition for appeal by the United States filed. Assignment of errors by the United States filed. Order entered allowing appeal of the United States. Citation on appeal of the United States filed.

June 20. Citation on appeal of Interstate Commerce Commission, addressed to Erie Railroad Co. or George F. Brownell, filed.

June 17, 19, 20. Certified copy of citation on appeal of United States served on each petitioner.

June 20. Certified copy of citation on appeal of Interstate Commerce Commission served on Erie Railroad Co.

June 26. Præcipe for transcript of record filed.

1912.

July 1. Mandate of United States Supreme Court reversing decree of Commerce Court and remanding cause to Commerce Court with directions to dismiss filed. Order entered in accordance with mandate of Supreme Court dissolving injunction and dismissing petition.

A true copy.
Test.
[SEAL.]

G. F. SNYDER,
Clerk of the United States Commerce Court.
By W. S. HINMAN.

Mr. SIMPSON. I also offer in evidence the transcript of the docket entries in the Meeker case, No. 49.

The transcript referred to is as follows:

[U. S. S. Exhibit Y Y.]

TRANSCRIPT OF DOCKET ENTRIES, UNITED STATES COMMERCE COURT.

(Docket No. 49.)

PARTIES.

Lehigh Valley Railroad Co. (petitioner) *v.* United States (respondent).

INTERVENERS.

Interstate Commerce Commission, Henry E. Meeker.

ATTORNEYS.

For petitioner: E. H. Boles, John G. Johnson, Frank H. Platt, Everett Warren.
For United States: James A. Fowler, Blackburn Esterline.
For Interstate Commerce Commission: Charles W. Needham.
For Henry E. Meeker: William A. Glasgow, jr.

PROCEEDINGS.

1911.

September 29. Petition and exhibits filed. Copy of petition filed with chairman of Interstate Commerce Commission and in Department of Justice. Appearance of Interstate Commerce Commission as party respondent and Charles W. Needham as solicitor filed.

October 7. Petitioner's affidavits filed.

October 9. Objections of United States to affidavits offered in support of motion for preliminary injunction filed. Brief for petitioner filed. Motion of the Interstate Commerce Commission to dismiss the petition filed. Motion of the United States to dismiss the petition filed. Petition of intervention of Henry E. Meeker filed. Order entered granting leave as prayed in foregoing petition. Brief for Henry E. Meeker, intervener, filed.

October 10. Brief for United States in opposition to motion of petitioner for preliminary injunction filed.

October 12. Certified copy annual report Lehigh Valley Railroad Co. for year ending June 30, 1911, filed. Per curiam opinion denying motion for preliminary injunction filed. Order entered denying motion for preliminary injunction.

November 22. Order setting cause for hearing on motions to dismiss filed.

December 5. Continued to next calendar (Jour., p. 86).

1912.

March 28. Motion of H. E. Meeker, surviving partner of the firm of Meeker & Co., to dismiss the petition.

April 5. Brief for Interstate Commerce Commission on motion to dismiss petition filed.

April 9. Brief for United States in support of motion to dismiss petition filed.

April 11. Petitioner's motion to withdraw its petition filed. Order entered withdrawing petition without prejudice at cost of petitioner.

April 15. Order entered amending final order on face thereof.

May 7. Satisfaction of judgment for costs filed by United States.

A true copy.
Test:
[SEAL.]

G. F. SNYDER,
Clerk of the United States Commerce Court.
By W. S. HINMAN,
Deputy Clerk.

Mr. Manager WEBB. We have no objection to their going in, Mr. President.

Mr. SIMPSON. I do not ask that they be read, Mr. President.

I also offer in evidence the opinion of the Supreme Court in the Lighterage case, which has already been marked as "Exhibit H."

The opinion referred to is as follows:

[U. S. S. Exhibit H.]

SUPREME COURT OF THE UNITED STATES.

(No. 722.—October term, 1911.)

The United States, The Interstate Commerce Commission, and The Federal Sugar Refining Co., appellants, *v.* The Baltimore & Ohio Railroad Co., The Central Railroad Co. of New Jersey, et al. Appeal from the United States Commerce Court.

(June 10, 1912.)

The Chief Justice delivered the opinion of the court.

This is a suit instituted in the Commerce Court to enjoin the enforcement of an order by the Interstate Commerce Commission.

The complainants in the bill are the Baltimore & Ohio Railroad Co., the Central Railroad Co. of New Jersey, the Delaware, Lackawanna & Western Railroad Co., the Erie Railroad Co., the Lehigh Valley Railroad Co., the New York, Ontario & Western Railway Co., and the Pennsylvania Railroad Co. The Brooklyn Eastern District Terminal and John Arbuckle and William A. Jamison, copartners, trading as the Jay Street Terminal, intervened and were made parties complainant, they being interested to defeat the order of the commission.

The defendant named in the bill is the United States. The Interstate Commerce Commission appeared, and the Federal Sugar Refining Co. intervened and was made a party defendant.

The order which it was the purpose of the suit to enjoin was made in a proceeding commenced before the commission on behalf of the Federal Sugar Refining Co. to compel the railroads above named to desist and abstain from paying to Arbuckle Bros., claimed to be operating what is known as the Jay Street Terminal, certain so-called allowances for floatage, lighterage, and terminal services rendered by them to the complainants in connection with sugar transported by them in New York Harbor to and for the complainants, while at the same time paying no such allowances to the said Federal Refining Co. on its sugar.

We substantially adopt as accurate a summary statement made of the subject matter of the controversy in the brief of counsel for the railroad companies:

"The Federal Sugar Refining Co. has a refinery at Yonkers, N. Y., and Arbuckle Bros. have a refinery in the Borough of Brooklyn, New York City. The railroad companies operate what are known as trunk-line railroads, extending from New York to western and southern points. In order to receive and deliver freight in New York City they are obliged to transport the same across the waters of New York Harbor on lighters by what is called lighterage service, or, when the freight is carried through in railroad cars, on car floats by what is called floatage service.

"At numerous points along the New York City water front within the lighterage limits they have established public stations for the receipt and delivery of freight.

"They have also established boundaries known as 'lighterage limits,' including substantially all of what may be called the manufacturing and commercial portion of the water front of New York City and the opposite shore of New Jersey and within these boundaries they receive and deliver freight at any accessible point on the water front without any additional charge above the New York rates, which are, generally speaking, the same as the rates to and from the terminals on the New Jersey shore. At 'public' docks open to any vessel, the railroad pays the wharfage; at private docks the shipper or consignee must arrange for the necessary dockage.

"At a number of points in the boroughs of Brooklyn and the Bronx the railroad companies or some of them furnish public stations through arrangements made with terminal companies to furnish union public stations and terminal facilities for the receipt and delivery of freight in cars and through freight houses, and for the transportation of such freight between such terminal stations and the railroad companies' rails on the western shore of the harbor, all of which is done for and in the name of the railroad companies under provisions of their tariffs filed with the Interstate Commerce Commission under which their New York rates apply to and from such union public stations.

"One of these public terminal stations, known as the Jay Street Terminal, is owned and operated by William A. Jamison and John Arbuckle, conducting a separate business in that respect as copartners under the name and style of 'Jay Street Terminal' in accordance with the laws of the State of New York. Jay Street Terminal is named as a station of the railroad companies, appellees, in their respective tariffs, and is conducted under contract with the railroad companies like any other freight station, bills of lading being issued from and to it on behalf of the railroad companies and in their names, on the regular uniform form, charges being collected and accounts kept, the Jay Street Terminal performing the entire physical and clerical service and furnishing the necessary docks, freight yard, and station buildings and equipment, excepting cars. The Jay Street Terminal also floats or lighters all shipments between the terminal and the rails of the railroad companies on the New Jersey shore. For these services and facilities each railroad company pays to the Jay Street Terminal an aggregate compensation figured on the freight handled for it, based on the rate of 4½ cents per hundred pounds on freight originating at or destined to points at or west of the westerly limits of trunk line territory, so called, and 3 cents per hundred pounds on freight originating at or destined to points east of the westerly limit of trunk line territory. The same amounts per hundred pounds are paid to other terminal companies furnishing similar service at New York.

"The refinery of Arbuckle Brothers, a copartnership composed of William A. Jamison and John Arbuckle, is within two blocks of the Jay Street Terminal, and they truck sugar from their refinery to this terminal and load it into cars at their own expense and deliver it to the Jay Street Terminal and obtain the railroad company's bill of lading for it from the Jay Street Terminal just as other shippers do with other freight.

"The refinery of the Federal Sugar Refining Co., at Yonkers, N. Y., formerly operated by the Federal Sugar Refining Co. of Yonkers, is located on the Hudson River, 10 miles north of the limits of the lighterage limits. The sugar manufactured at this refinery and shipped over the lines of these appellees is loaded onto lighters of the Ben Franklin Transportation Co., an independent boat line with which the Federal Sugar Refining Co. has made a contract, under which the boat line lighters its sugar to the terminals of the railroad companies for 3 cents per hundred pounds. The boat line brings the sugar to the terminals of the railroads on the western shore of New York Harbor and delivers it to them for rail transportation.

"The Federal Sugar Refining Co.'s refinery at Yonkers is located directly on the tracks of the New York Central & Hudson River Railroad Co. Over this railroad the rates to the points in the shipping territory of the Federal Sugar Refining Co. are with few exceptions the same as the rates via the lines of the railroad companies. To ship at the New York rate over the lines of the roads the Federal Sugar Refining Co. can deliver its shipments to the New York Central & Hudson River Railroad at Yonkers, thence to be transported by that railroad to New York and there delivered to the said railroad companies within lighterage limits. None of these railroads have lines extending to Yonkers. Because of alleged delay in the handling and transportation of shipments via this route, the Federal Sugar Refining Co. sometimes prefers to deliver said shipments by lighter to the said railroad companies at their stations on the New Jersey shore of New York Harbor.

"Prior to July, 1909, these shipments were carried by the Ben Franklin Transportation Co. directly to the rail terminals on the Jersey shore from Yonkers without stop. Since that date the lighters stop en route at Pier 24, North River. The reason for stopping at Pier 24 is found in the decision made by the commission in case No. 1082, brought by the Federal Sugar Refining Co., of Yonkers, the predecessor of the Federal Sugar Refining Co., against the same railroad companies, appellees here. (17 I. C. C., 40.) The complaint in that proceeding claimed a discrimination against the Federal Sugar Refining Co., of Yonkers, and in favor of the Jay Street Terminal and the Brooklyn Eastern District Terminal, an incorporated company operating a similar terminal station in another section of Brooklyn, because of the refusal of the railroad companies to pay it the same amounts on account of the lighterage performed by the Ben Franklin Transportation Co. from Yonkers to the rail terminals of the railroad company on the western shore of New York Harbor as were paid to the two terminal companies above named on account of the various services performed and terminal facilities furnished by them in connection with the transportation of sugar shipped by Arbuckle Bros. and the American Sugar Refining Co., respectively. This complaint was dismissed because the extension of the lighterage limits in New York Harbor of the railroad companies was a matter of business discretion, and that the commission had no authority to require such extension beyond the then prescribed boundaries, and that the Federal Sugar Refining Co., being located outside of the prescribed lighterage limits, was not subjected to unlawful discrimination by reason of the practice of the railroad companies in affording free lighterage on shipments originating at a distance to points within said lighterage limits while refusing to so afford on shipments of the Federal Sugar Refining Co.

"As a result of this decision of the commission the lighters of the Ben Franklin Transportation Co. were stopped en route from Yonkers at Pier 24, North River, where certain formalities with reference to shipping orders were had for the purpose of making it appear as a matter of law that these shipments were made not from Yonkers, but from Pier 24, North River, a point within lighterage limits. A new complaint was filed with the commission, setting forth the same grounds of discrimination as the prior one, but on the theory that the decision of the commission did not apply because the shipments of the Federal Sugar Refining Co. were now lightered from Pier 24, a point within lighterage limits, and not from Yonkers, the commission held as a matter of law that the stoppage of the lighters of the Ben Franklin Transportation Co. for instructions at Pier 24 differentiated the case from the former one and made the following order:

"'It is ordered that the above-named defendants (the appellees) be, and they are hereby, notified and required to cease and desist on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain from paying such allowances to Arbuckle Bros. on their sugar, while at the same time paying no such allowance to said complainant (Federal Sugar Refining Co.) on its sugar, which said allowances so paid to said Arbuckle Bros. by said defendants are found by the commission in said report to be unduly discriminatory and in violation of the act to regulate commerce.'

"The so-called 'allowances' referred to in this order are a part of the payments making up the compensation of the Jay Street Terminal, figured at the rates of 3 cents and 4½ cents per hundred pounds as above described."

This is the order the enforcement of which was the subject matter of the controversy in the court below.

The United States, the Interstate Commerce Commission, and the Federal Sugar Refining Co. promptly filed motions to dismiss the petition and the intervening petition of the Jay Street Terminal upon the ground of want of equity and because the order of the commission was an adjudication of matters of fact as to which its judgment was conclusive. The petitioners, on the other hand, applied for an injunction pendente lite suspending the order of the commission until the final determination of the action. The motions to dismiss were denied. On the same day the motion for a temporary injunction—which had been heard upon the petition and intervening petitions and affidavits submitted by petitioners in support of the averments of the petition and intervening petition—was granted, and the assailed order "and its force and effect" was suspended until the further order of the court. This appeal was then taken.

There was clearly a right in the court below to entertain jurisdiction of the petition and to determine whether the affirmative order of the commission was entitled to be enforced. There was clearly also power in the court to allow a preliminary injunction, since that authority is conferred in express terms by section 3 (208) of the act. And the right to appeal from such an order is also in express terms conferred by section 2 (210) of the act.

It is urged on behalf of the United States and the Interstate Commerce Commission that, wholly irrespective of the merits of the petition, the order granting the interlocutory injunction must be reversed because of what is insisted to be the express requirements of the act imposing the duty on the Commerce Court or a judge of that court if a restraining order is granted under the conditions in the statute to state the facts from which it is found that irreparable injury would arise if a restraining order were not allowed. The section containing the provision relied upon is as follows:

"That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the Commerce Court other than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or part of the operation of the order of the Interstate Commerce Commission for not more than 60 days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application."

Without ambiguity we think the statute contemplates three classes of orders: First, a temporary restraining order staying in whole or in part the operation of the order of the Interstate Commerce Commission for not more than 60 days from the date of the suspensive order, to be allowed by the court or a judge thereof; second, a preliminary injunction—that is, an injunction pendente lite—which, to quote the words of the statute, may be granted by the court to "restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit"; third, in the nature of things a perpetual injunction upon the entry of the final decree. The order in this case, made after notice and hearing, suspending the force and effect of the order of the commission until the further order of the court, was obviously an exercise of the power conferred to grant a preliminary injunction or injunction pendente lite and not of the power to allow a temporary restraining order embraced in the first of the classes stated. As we think it clear that the requirements of the statute relied upon respecting the statement of facts as to irreparable damages relate only to the first class of cases—that is, the power to issue a temporary restraining order—we hold the objection to be without merit.

This brings us to consider the scope of our reviewing authority under the right conferred by the statute to appeal from the allowance by the court below of a preliminary injunction or injunction pendente lite. To determine this question requires a consideration of the nature and character of the powers which the court had a right to exert over the subject matter presented to it by the petition filed to perpetually enjoin the enforcement of the order of the commission.

We have determined in the Procter & Gamble case, ante, that the Commerce Court was but endowed in considering whether an affirmative order of the commission should be enforced on the one hand or set aside and declared nonenforcible on the other with the jurisdiction and power existing at the time that act was passed in the circuit courts of the United States. And as, at that time it was conclusively settled that the courts had only authority to reexamine the findings of the commission as to subjects like the one here under consideration, for the purpose of ascertaining whether the action of the commission was repugnant to the Constitution, in excess of the statutory powers conferred upon it, or manifested such an abuse as to be equivalent to an excess of authority, it clearly results that the court below was likewise limited in passing upon the petition before it in this case. This being true, it is also necessarily true that virtually the sole authority of the court below was in a sense confined to determining questions of law arising upon the case as presented on the face of the pleadings. Under the general principles of equity, where a court is called upon to decide whether it will allow a preliminary or pendente lite injunction the duty arising requires it to be determined whether on the face of the papers presented there is such an equitable cause of action presented as justifies the issue of a preliminary injunction to preserve the status pending the suit; that is, to afford an opportunity for a trial of the issues presented. Necessarily it is true also that where an appeal is allowed from an order granting a preliminary injunction the reviewing court is put to the duty of determining whether on the face of the papers the court below erred as a matter of law in granting the preliminary injunction. Do these principles apply to the case before us, is then the first consideration. The result of holding that they do will inevitably cause the expunging from the act of the express authority conferred to issue a preliminary injunction, since, viewed under the general principles of equity, the criteria by which to determine the rightfulness of such an order, in view of the nature and character of the jurisdiction of the Commerce Court, is exactly and exclusively the same criteria by which the rightfulness of a final decree of that court issuing a perpetual injunction in conformity to such decree would require to be tested. Our duty, however, is not to destroy the law but to enforce it, and in doing so to seek to discover the intention of the lawmaker, the wrong intended to be prevented, and the remedy designed to be afforded by the enactment of the statute. Coming to consider the statute for this purpose, we have pointed out in the Procter & Gamble case that the great remedy intended to be accomplished was the concentration in a single court of the power to consider the rightfulness of enforcing or setting aside orders of the commission; that to prevent unnecessary delays the limitations as to restraining orders and their duration and the hearing which is commanded as to irreparable injury was enacted. It must therefore in reason be that the power to issue a preliminary injunction was recognized and preserved so as to afford the court the proper time for deliberation and consideration of the questions to be decided by the commission, instead of compelling that body, virtually eo instante, upon the presentation of a petition to reach a final conclusion. And it would seem also to be the case that the right to appeal from such an order was given as a safeguard against a possible abuse of discretion by an unwarranted, arbitrary, and unreasonable exercise of the power conferred. In other words, we think that the enlightened purpose of Congress was that the court which it created, in the exercise of the important trusts confided to its authority and where occasion required it as a consequence of the gravity and complexity of the legal questions which might arise, should be afforded ample opportunity for due consideration and ripe judgment and that it was not intended to compel precipitate and perhaps ill-considered action.

Coming to consider the case presented in the light of these principles, in view of the doubt which existed as to the scope and effect of the powers conferred upon the commission, as shown by the decision of the court in the Procter & Gamble case, of the nature and character of the subject matter here under consideration and its importance, of the action of the commission had on that subject prior to the making of the order of the commission which was assailed by the petition, and especially of the diversity of opinion which existed among the members of the commission on the subject, we think there is no room for saying that the preliminary injunction issued was in excess of the power conferred upon the court, because of the plain want of necessity for it resulting from the obvious nature and character of the legal questions as to which the judgment of the court was invoked in consequence of the filing of the petition calling for the exertion of the authority conferred upon it by Congress.

It is not disputable that although the right to appeal to this court from an order like the one here in question is conferred, yet obviously the purpose which must have caused the creation of the Commerce Court must have been the desire to interpose between the action of the commission and this court an intermediate tribunal, having the powers which the statute delegates to it. Our duty is to give that purpose effect and to uphold the lawful authority of the court, without deviation and yet without hesitancy where there has been an abuse of discretion to correct it in the completest way. But as this case manifests no such abuse, our duty is not to reverse the action of the court but to remand the case so that there may be an opportunity to dispose of it on the merits in the forum selected by Congress for that purpose. Of course, in saying this, we must not be understood as deciding or in any way implying that the duty would not exist to examine the merits of a preliminary order of the general character of the one before us in a case where it plainly in our judgment appeared that the granting of the preliminary order was in effect a decision by the court of the whole controversy on the merits or where it was demonstrable that grave detriment to the public interest would result from not considering and finally disposing of the controversy without remanding to enable the court below to do so.

Affirmed.

True copy.

Test:

_____, *Clerk Supreme Court United States.*

Mr. SIMPSON. I also offer in evidence the final opinion of the Commerce Court in the lighterage case, which has already been marked "Exhibit I."

The opinion referred to is as follows:

[U. S. S. Exhibit I.]

UNITED STATES COMMERCE COURT.

(No. 38. October session, 1912.)

Baltimore & Ohio Railroad Co. et al., petitioners; Brooklyn Eastern District Terminal, John Arbuckle, and William A. Jamison, intervening petitioners, *v.* United States, respondent; Interstate Commerce Commission, Federal Sugar Refining Co., intervening respondents.

ON FINAL HEARING ON MOTIONS TO DISMISS.

(For opinion of Interstate Commerce Commission see 20 I. C. C. Rep., 200.)

Mr. George F. Brownell, with whom Mr. H. A. Taylor was on the brief, for the petitioners.

Mr. Henry B. Closson and Mr. William N. Dykman for the intervening petitioners.

Mr. Winfred T. Denison, Assistant Attorney General, and Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Ernest A. Bigelow for the Federal Sugar Refining Co.

Before Knapp, presiding judge, and Hunt, Carland, and Mack, judges.

(November 15, 1912.)

Carland, judge:

The petition in this case was filed April 12, 1911, and seeks to have annulled and set aside an order of the Interstate Commerce Commission, dated March 6, 1911, the provisions of which are hereinafter stated. On April 19, 1911, upon its own petition, the Federal Sugar Refining Co. was made a party defendant, with leave to appear and be represented by counsel. On May 11, 1911, the Interstate Commerce Commission and the Federal Sugar Refining Co. filed a motion to dismiss the petition for the reason that the facts set forth therein did not constitute a cause of action, and on the same day the Brooklyn Eastern District Terminal Co., upon leave granted, filed its intervening petition. On May 12, 1911, the United States filed a motion to dismiss for the reason, among others therein stated, that the petition did not show there was any equity therein upon which to grant the relief prayed or any part of the same. On the same day the Jay Street Terminal and Arbuckle Bros., upon leave granted, filed their intervening petition. On May 17, 1911, upon motion of Mr. Blackburn Esterline, assistant to the Attorney General, it was ordered that the motion to dismiss the petition filed by the United States be extended and considered as a motion to dismiss the intervening petition of Arbuckle Bros. and Brooklyn Eastern District Terminal, and upon motion of Mr. P. J. Farrell, counsel for the Interstate Commerce Commission, it was ordered that the motion to dismiss the petition filed by the Interstate Commerce Commission and the Federal Sugar Refining Co. be extended to and considered as a motion to dismiss the intervening petition of Arbuckle Bros. and the Brooklyn Eastern District Terminal.

On May 17, 1911, the motions for a temporary injunction made by the petitioners and intervening petitioners, and the motions to dismiss, came on for hearing before the court; and thereafter, on May 22, 1911, the motions to dismiss were by the unanimous decision of this court denied, with leave to the respondents making said motions to answer the petition of the petitioners within 20 days from said date if they should be so advised; and on the same day the motions made for a temporary injunction were granted and an order entered suspending the order of the Interstate Commerce Commission complained of until the further order of the court.

On June 12, 1911, the Federal Sugar Refining Co. and the Interstate Commerce Commission prayed an appeal to the Supreme Court of the United States from the order or decree of the Commerce Court rendered on May 22, 1911, and assigned as one of the errors committed by this court that it erred in not dismissing the petition for want of equity. The appeal prayed for was allowed by this court on June 13, 1911. On June 16, 1911, the United States prayed an appeal to the Supreme Court of the United States from the order or decree of this court entered May 22, 1911, and assigned as error, among others, that the Commerce Court erred in not sustaining the motion of the United States to dismiss the petition and the intervening petitions. The appeal prayed for was granted by this court on the same day. On June 10, 1912, the Supreme Court of the United States affirmed the decree of this court entered May 22, 1911.

On June 9, 1911, the Federal Sugar Refining Co. filed its answer to the original petition, and on the same day the United States filed its answer to the original petition and also to the intervening petitions of Arbuckle Bros. and Brooklyn Eastern District Terminal. The Interstate Commerce Commission has never answered either of the petitions.

The mandate of the Supreme Court was filed in this court on June 24, 1912. On October 10, 1912, the United States and the Federal Sugar Refining Co., upon leave granted by the court, withdrew their several answers, and on the same day filed their motion to dismiss the petition of the petitioners for the reason that the facts set forth in said petition did not constitute a cause of action or entitle said petitioners to the relief or any of the relief asked for by them in and by said petition. This action of the United States and the Federal Sugar Refining Co. left the case standing upon the petitions of the petitioners and the intervening petitioners and the motions to dismiss of the respondent, and intervening respondents Federal Sugar Refining Co. and Interstate Commerce Commission. In this condition of the case the parties, by their counsel, appeared in open court and stipulated that the case be submitted to the court for final decision upon the merits on the petitions and motions to dismiss.

The material facts as they appear in the petitions are as follows:

The petitioning railroads are engaged in the transportation of passengers and property by railroad from one State to another, and all have rail termini upon the New Jersey shore of the harbor of New York except the Baltimore & Ohio Railroad Co., whose rail terminus is at St. George, Staten Island, and the Pennsylvania Railroad Co., whose rail terminus for passenger traffic only is in the Borough of Manhattan. In order to reach the shipping territory of Greater New York across the Hudson and East Rivers and other waters petitioners have been compelled to serve the vast shipping interests of Greater New York by means of floats, lighters, and barges. Petitioners have established a lighterage zone, known as the lighterage limits, which has been in effect for several years, and during that time has been and is now described in the tariffs of each of said petitioners, which tariffs have been and are duly filed with the Interstate Commerce Commission, as follows:

"North River: New York side, Battery to One hundred and thirty-fifth Street; New Jersey side, Jersey City, N. J., to and including Fort Lee, N. J.

"East River and Harlem River: New York side, Battery to Jerome Avenue Bridge, including Harlem River side of Wards and Randalls Islands; Brooklyn side, from Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks and points in Wallabout Canal west of Washington Avenue Bridge and to Hamilton Avenue Bridge, Gowanus Canal, to and including Sixty-ninth Street, South Brooklyn (Bay Ridge).

"New York Bay: Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and include Shooter Island; points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, Staten Island."

Within said lighterage limits petitioners perform, without additional charge, a lighterage service on eastbound shipments from their rail terminals upon the western shore of New York Harbor to points within those limits, and on westbound shipments from points within those limits to their rail terminals upon the western shore of New York Harbor.

Within said lighterage limits and at various points within the Boroughs of Manhattan and Brooklyn, city of New York, each petitioner has established and for several years has maintained, and still maintains, freight terminal stations at which it delivers east-bound freight and receives west-bound freight for transportation over its lines. Each petitioner has some freight terminal stations, as aforesaid, which it owns and directly operates, and others which are operated for it under and pursuant to the provisions of certain contracts between it and the owners of said terminal stations. In some instances a single terminal station is operated for and on behalf of two or more of said petitioners under and pursuant to certain contracts between them and the owner of said station, and in such instances said terminal station is a union terminal for two or more of said petitioners. It is impossible for petitioners to deliver and receive all freight, especially carload freight, at said terminals. A large part of it must of necessity be delivered and received at public and private docks within the said lighterage limits. Accordingly, petitioners have for several years received and delivered freight at all steamship piers, docks, and landings, and private piers or landings when shippers or consignees arrange for the receipt or delivery of freight within the lighterage limits, and have lightered it without additional charge from and to said points, and still do so receive, deliver, and lighter it. Petitioners transport between said terminal stations, piers, docks, and landings and their rail terminals on the western shore of New York Harbor, as a part of the transportation service from the points of shipment to the point of destination, and for the flat New York rate, by means of lighters, floats, and barges owned and directly operated by them, or operated for them under contracts between them and the owners of such equipment, freight received at or destined to said terminal stations, piers, docks, and landings.

Petitioners for several years past have held and now hold themselves out as common carriers to and from all said points within the lighterage limits, both by their practice of receiving and delivering freight at said points and by their tariffs, which are now and for several years past have been duly published and filed with the Interstate Commerce Commission. The liability under their respective bills of lading attaches to petitioners on west-bound shipments from the time the freight is received at such terminal station, dock, pier, or landing and ends on east-bound shipments when delivered into the hands of the consignee at such terminal station, dock, pier, or landing. The bill of lading issued by petitioners for freight so received or delivered by them by its terms covers and includes the lighterage movement.

Among other terminal freight stations established by petitioners within the said lighterage limits is the Jay Street Terminal. This terminal is located at the foot of Bridge Street, Brooklyn, on the East River, having a water frontage of 1,200 feet and a depth of 600 feet. Its equipment consists of a large freight house, 2 Baldwin locomotives, 3 tugboats, 2 steam lighters, 11 barges, and 9 car floats. The capacity of the yard is about 235 cars. The Jay Street Terminal is a union freight terminal for all of said petitioners and is designated as a regular public freight terminal of petitioners in their tariffs filed with the Interstate Commerce Commission. It is owned by a copartnership composed of William A. Jamison and John Arbuckle, conducting such freight terminal as a separate business under the name and style of Jay Street Terminal, under certificate filed with the clerk of New York County, in accordance with the law of the State of New York, and is operated as a freight station for petitioners under and pursuant to several contracts between petitioners and the Jay Street Terminal, which contracts are substantially identical in their terms and provisions. The material parts of one of said contracts and representative of them all appears in the margin, and is as follows:

This agreement, made the 5th day of February, A. D. 1906, by and between Jay Street Terminal (hereinafter called Terminal Co.), party of the first part, and Erie Railroad Co., party of the second part, witnesseth:

"Whereas the Terminal Co. is the owner of premises in the Borough of Brooklyn, city of New York, lying along and contiguous to the East River at a point east of Catherine Ferry, so called, and west of the United States navy yard, upon which there are now erected, or in process of erection, certain warehouses, bulkheads, docks and piers, railway tracks and sidings, equipped or about to be equipped with suitable float bridges and approaches, and the usual appurtenances for receiving, handling, and delivering freights and for transporting same between said premises and the freight station of said railroad company located at Jersey City, N. J.; and

"Whereas the said Terminal Co. is engaged in and will continue in the business of receiving freights at its said premises and carrying the same in both directions between its said premises and the said station of said railroad company and other carriers; and

"Whereas the said railroad company desires to avail itself of the facilities, conveniences, and services of the said Terminal Co. in the transportation of freights, in both directions, between the said premises of said Terminal Co. and the aforesaid freight station of the said railroad company:

"Now, therefore, in consideration of the mutual covenants, promises, and agreements herein contained, the said parties do hereby covenant, promise, and agree to and with each other as follows:

"First. The said Terminal Co. will put and maintain its premises in good order and condition for the reception and delivery of such freights, and will provide tugboats, car floats, docks, piers, float bridges, and approaches adequate at all times to receive, discharge, transfer, and deliver such freights loaded or to be loaded in cars under this contract, and sufficient to accommodate the amount of business hereunder contemplated.

"Second. Said Terminal Co. will receive at the said float bridges of said railroad company at its aforesaid freight station, in cars to be placed upon its floats by said railroad company, all freights intended for delivery at the aforesaid premises of the said Terminal Co., and will safely carry the same to its said premises, and there make delivery thereof to the consignees. It will also receive and load into cars all freights which may be delivered to it at its said premises for transportation over the lines of said railroad company and carry and deliver the same to said railroad company upon said Terminal Co.'s floats at the float bridges of said railroad company at its aforesaid freight station.

"Third. The responsibility of said Terminal Co. for eastwardly bound cars and the freights therein shall begin when the cars are placed upon its floats at the said float bridges at the aforesaid station of said railroad company, and shall continue as respects the cars until they have been returned by it, loaded or empty; and as respects the freights contained in eastwardly bound cars its responsibility shall continue until the actual delivery thereof to and acceptance by the consignees at Brooklyn. As respects the freights to be transported westbound, said Terminal Co.'s responsibility shall commence at the time the same is received from the consignor at its aforesaid premises and shall continue until said freights, loaded into cars, have been brought to the float bridge of said railroad company at its aforesaid freight station and until the floats have been attached to the float bridge and the cars are in complete readiness for removal from the car floats by said railroad company.

"Fifth. The railroad company agrees to construct and maintain all necessary tracks, float bridges, approaches, and appurtenances at its said freight station to adequately carry out the purpose of this agreement.

"Sixth. Said railroad company will pay said Terminal Co. in full for all its services under this contract, as well as in full compensation for all responsibility to be undertaken by it in respect to cars and freight, as follows:

"(a) For all freights transported over said railroad company's railroad which shall have been received from its connecting lines west of trunk line western termini on through rates, or for freight received by the said Terminal Co. at its aforesaid premises and destined for transportation by said railroad company to points west of said western termini on through rates, excepting grain in bulk, at the rate of 4½ cents per hundred pounds. It is agreed, however, that whenever the allowance to Palmers Dock on eastbound or westbound rail-and-lake traffic or both is reduced from 4½ cents to 3 cents per hundred pounds the same reduction shall be made in the allowance to Jay Street Terminal on rail-and-lake traffic. And it is also agreed that whenever the allowance for like service on such traffic to said Palmers Dock or any other Brooklyn termini is increased above the rates herein specified the same increase shall be made in the allowance to said Jay Street Terminal on such traffic.

"(b) For freight originating at or destined to any of the said western termini or points east thereof, or billed to or from said western termini at local rates, the allowance to said Terminal Co. shall be 3 cents per hundred pounds, whether or not the traffic reaches the terminal point through any other of said termini, it being understood that the western terminal points referred to are as follows: Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Salamanca, Erie, Pittsburgh, Allegheny, Bellaire, Wheeling, Parkersburg, Dunkirk.

"(c) For 'not to be graded' grain in bulk, for track delivery in the borough of Brooklyn, the rate shall be 3 cents per hundred pounds.

"(d) For freight which is rated per gross ton, either in official classification or in commodity tariffs, the allowance shall be 3 cents or 4½ cents per hundred pounds, regardless of the gross-ton rating.

* * * * * * *

"Eleventh. Said railroad company agrees that during the continuance of this agreement the same rates of freight shall prevail from and to the premises of said Terminal Co. that prevail from and to the regular freight stations of said railroad company in the borough of Manhanttan, city of New York, excepting when coming from or going to points east of Susquehanna, in which case floatage shall be added in both directions, to which the railroad company shall be entitled.

"Twelfth. Said Terminal Co. will be responsible for and pay to said railroad company all freight moneys and charges as set forth in freight bills rendered by said railroad company for the transportation of east-bound freights delivered to it, and in like manner shall be responsible for and pay to said railroad company all moneys and charges which have been made payable in advance on west-bound freights, all of which payments shall be turned over to said railroad company in accordance with the latter's customary rules; and, if so required, the customary guaranteed bond shall be furnished by the said Terminal Co.

"Thirteenth. Said railroad company will provide sufficient cars at all times for receiving and taking away the freights hereunder contemplated (unavoidable delay excepted), and to supply all the railway books and blanks necessary for the purpose of the business to be carried on under this contract, and with all reasonable dispatch to receive and take away from the said float bridges at its aforesaid station all the west-bound freights intended for transportation over its own lines and its connections.

"Fourteenth. Said Terminal Co. will insure and keep insured against loss by fire and marine risks all freights, cars, and property received by it upon its floats or its said premises under this contract so long as said freights, cars, or property shall remain in its possession and until delivered to the consignees or to said railroad company as hereinbefore

provided, including the time such freights, cars, or property shall be upon its lighterage line; and such insurance shall be for the benefit of said railroad company and others as their respective interests shall appear, and to an amount and in such manner as shall be satisfactory to said railroad company.

"Fifteenth. Said railroad company will not during the continuance of this agreement, unless legally compelled to do so, establish or maintain any freight stations within the limits of said Borough of Brooklyn between said Catherine Ferry and said United States navy yard. In case of any breach of this condition said Terminal Co. may recover from said railroad company, and the latter shall pay to said Terminal Co. damages at the rate of $3 for each and every carload, averaged at 20,000 pounds, received or delivered or transported contrary to this provision.

"Sixteenth. In case any east-bound freight consigned to stations of said railroad company in said city of New York other than the premises of said Terminal Co. shall have its destination changed to the premises of the said Terminal Co. and be delivered thereat, said Terminal Co. will, at the request of said railroad company, collect from the consignee or forwarder the sum of 3 cents per hundred pounds, and such 3 cents per hundred pounds shall be retained by said Terminal Co. as full compensation for all services performed by it in such cases, and no other allowance shall be made under this contract in such case.

"Seventeenth. Said Terminal Co. will furnish said railroad company with a complete and accurate copy of each and all contracts made by it with other railroad companies during the term of this contract, and the Erie Railroad Co. shall have and enjoy during the life of this contract all rights and privileges granted to any other railroad by said Terminal Co. upon as favorable terms, with respect to allowances or otherwise, as granted to any other railroad company, anything herein to the contrary notwithstanding.

"Eighteenth. This contract shall become operative and go into effect on the 15th day of February, 1906, and shall continue in force until March 31, 1910; thereafter subject to termination upon 90 days' notice by either party."

The Jay Street Terminal serves the shippers of a large and important manufacturing and shipping territory, including about one-third of the densely populated part of Brooklyn. It is the only convenient and accessible freight station of petitioners for the shippers of that territory. When it became necessary several years ago for petitioners to establish and operate public freight terminals for the service of said territory, they had no choice but to enter into a contractual arrangement with the owner of the Jay Street Terminal for the operation of said terminal as a public freight station of petitioners. The price of the water-front property in that section was so high as to be prohibitive. No independent terminals other than the Jay Street Terminal were conveniently accessible to the shippers of that territory. In no other practicable way could petitioners in the past, nor can they at present, serve the large and important shipping interests of this section of Brooklyn than by the maintenance of the Jay Street Terminal as a public freight station of petitioners under and pursuant to said contracts.

Arbuckle & Jamison operate a sugar refinery in the Borough of Brooklyn, located upward of a block from the Jay Street Terminal. Shipments are carted from and to the terminal by Arbuckle & Jamison and handled at the terminal in the same way as the freight of hundreds of other shippers, and the freight charges thereon are collected from said Arbuckle & Jamison by the Jay Street Terminal in accordance with the regularly published tariffs of petitioners. Approximately four-fifths of the shipments of sugar made by Arbuckle & Jamison through said Jay Street Terminal are sold by said Arbuckle & Jamison f. o. b. Brooklyn and become the property of the consignees immediately upon delivery to the terminal. During the first six months of 1907 the bills of lading issued by the Jay Street Terminal for shipments of general merchandise numbered 92,622, of which 3,969 were for Arbuckle & Jamison sugar and 1,210 for Arbuckle & Jamison coffee, and the shipments and receipts of said Arbuckle & Jamison constituted less than one-third of the total tonnage moving through the terminal. During the same period the number of different consignees who received freight at the terminal was about 765, and the number of different shippers through the terminal about 560. The profits in the operation of the Jay Street Terminal on all shipments during the same period amounted to less than 3 per cent on the investment, without making any allowances for depreciation or interest.

The Federal Sugar Refining Co. is a corporation of the State of New York, having its executive offices at 138 Front Street, in the Borough of Manhattan, and having its refineries from which it ships all its outbound products, including sugar, and at which it receives all its inbound supplies for the manufacture of sugar and commodities allied thereto, on the east bank of the Hudson River, within the corporate limits of the city of Yonkers, and more than 10 miles distant from the northernmost boundaries of the lighterage limits of petitioners. Said refineries are located on the line of the New York Central & Hudson River Railroad Co., with which they have switch connections and over which the Federal Sugar Refining Co. ships the greater part of its output and receives a large part of its inbound shipments. Over this railroad, with few exceptions, the rates to points in the shipping territory of the Federal Sugar Refining Co. are the same as the rates from the Jay Street Terminal over the lines of petitioners. In order to make shipments of its sugar from Yonkers via the lines of petitioners at the New York rate the Federal Sugar Refining Co. must deliver such shipments to the New York Central & Hudson River Railroad Co. at Yonkers, thence to be transported by that railroad to New York, and there delivered to petitioners at points within the lighterage limits. Because of alleged delay in the handling and transportation of such shipments via the route aforesaid, the Federal Sugar Refining Co. prefers to deliver said shipments directly to petitioners by lighter within the lighterage limits. Prior to July, 1909, the Federal Sugar Refining Co. of Yonkers, the predecessor of the Federal Sugar Refining Co., was accustomed to deliver its shipments at Yonkers to the Ben Franklin Transportation Co., which transported the same direct to the terminals of petitioners on the west shore of New York Harbor at a charge to the Federal Sugar Refining Co. of Yonkers of 3 cents per hundred pounds.

In the month of May, 1907, the Federal Sugar Refining Co. of Yonkers filed a complaint with the Interstate Commerce Commission against petitioners, alleging that the complainant, through the Ben Franklin Transportation Co., performed the same service on its shipments of sugar as were said to be performed by the Brooklyn Eastern District Terminal on shipments of the American Sugar Refining Co. and by the Jay Street Terminal on shipments of Arbuckle & Jamison; that the lighterage limits prescribed by petitioners were unduly discriminatory in that they did not extend to Yonkers and include the refinery of the Federal Sugar Refining Co. of Yonkers, and permitted allowances to be made on shipments of sugar from the refineries of Arbuckle & Jamison and the American Sugar Refining Co., while not so permitting on the complainant's shipments, because the latter was located outside the prescribed limits. This practice was said to result in unjust discrimination and to oblige complainant to pay unreasonable rates. Said complaint was answered by petitioners, and after due hearing and consideration the Interstate Commerce Commission dismissed said complaint, because the extension of petitioners' lighterage limits in New York Harbor was a matter of business discretion, and said commission had no authority to require such extension beyond the then prescribed boundaries, and complainant, being located outside of the prescribed lighterage limits, was not subjected to unlawful discrimination by reason of the practice of petitioners in affording free lighterage on shipments originating at or destined to points within said lighterage limits, while refusing to so afford on complainants' shipments.

As a device to appear to ship from within the lighterage limits, within a month after the decision of the Interstate Commerce Commission above mentioned a new corporation known as the Federal Sugar Refining Co. was organized, which established its principal office at 138 Front Street, New York City, and took over the refineries heretofore mentioned, in the city of Yonkers, and adopted the following practice: Contracts of sale or orders for sugar were received at 138 Front Street, and each of said orders was given a separate contract number, and said order bearing the contract number was forwarded to the refinery, where the order was filled and the barrels or bags were stamped with the contract number and placed on a lighter. The shipment bearing the contract number remained intact until it reached the hands of the buyer. The refinery received shipping instructions from 138 Front Street, and these shipping instructions showed the contract number, the ultimate destination, and the rail line over which the shipment was to be transported. The captain of the lighter of the Ben Franklin Transportation Co. gave a receipt to the refinery and received from the refinery a so-called bill of lading, which was a form of railroad bill of lading filled in by the Federal Sugar Refining Co., and designating a consignment to the Federal Sugar Refining Co., 138 Front Street, New York City, to be transported by the Ben Franklin Transportation Co. and showing the contract number with which the shipment had been marked. This alleged bill of lading was not signed by the Ben Franklin Transportation Co. through any of its officers or the captain of the lighter or by any other carrier. There was nothing in any of the documents which called for transportation to Pier 24, North River.

The said shipping instructions sent from 138 Front Street to Yonkers were to ship to "Federal Sugar Refining Co., 138 Front Street, City. B. F. T. Co. (B. & O.)," or other initials representing the Ben Franklin Transportation Co. and one of petitioners, as the case might be. None of the petitioners could or did perform any transportation service in connection with the Ben Franklin Transportation Co. between Yonkers and 138 Front Street, and such shipping instructions were, in fact, directions to deliver said shipments to the Ben Franklin Transportation Co. to be lightered and delivered to one of petitioners at its terminal on the west shore of New York Harbor. The practice was for the lighter of the Ben Franklin Transportation Co. to go to Pier 24, North River, N. Y., part of which pier is leased to the Ben Franklin Transportation Co., where the captain of the lighter called up the office of the Federal Sugar Refining Co., at 138 Front Street, and reported the particular shipment then on his lighter. The captain of the lighter was then handed a form of bill of lading not signed by any of petitioners and showing the name and address of the consignor as the Federal Sugar Refining Co., 138 Front Street, New York, Franklin Street Pier 24, North River. The lighter then proceeded to the rail terminus of such petitioners as had been previously designated in the shipping instructions sent to Yonkers, and there delivered the shipment to such petitioner and obtained the signature of petitioner's agent at said terminus upon the form of bill of lading theretofore prepared and delivered to said captain as aforesaid, and said bill of lading was stamped by said petitioner's agent to show the receipt of the shipment at said station on the west shore of New York Harbor.

Such shipments were handled under contract between the Ben Franklin Transportation Co. and the Federal Sugar Refining Co. for a compensation of 3 cents per 100 pounds, although the contract provides for a compensation of 4 cents per 100 pounds on sugar lightered from Yonkers to Pier 24, North River, payments for said service being made to the Ben Franklin Transportation Co. under that provision of said contract which provides for a compensation of 3 cents per 100 pounds for sugar lightered from Yonkers to petitioners' rail termini.

Having established the practice above described, the said Federal Sugar Refining Co. filed a complaint in October, 1909, with the Interstate Commerce Commission against petitioners. Said complaint alleged in substance that the interstate transportation of the product of the said Federal Sugar Refining Co. began at Pier 24, North River, Borough of Manhattan, a point within the lighterage limits as aforesaid, and that said Jay Street Terminal is owned and conducted by copartners named John Arbuckle and William A. Jamison, which said copartners owned, maintained, and operated in connection therewith a sugar refinery at the foot of Jay Street, Borough of Brooklyn; that said amounts of 3 cents per 100 pounds and 4½ cents per 100 pounds were paid to said copartners for the lightering of their sugar from Jay Street, Brooklyn, to the rail termini of petitioners on the west bank of New York Harbor, and that inasmuch as the said Federal Sugar Refining Co. was a competitor of the said Arbuckle & Jamison in the sugar business, it constituted an undue and unreasonable prejudice and disadvantage against said Federal Sugar Refining Co. to pay said amounts of 3 cents and 4½ cents per 100 pounds for the handling of sugar to said Arbuckle & Jamison, and not to pay similarly to the said Federal Sugar Refining Co. Hearings were had before the Interstate Commerce Commission upon the last mentioned complaint, and subsequently the commission issued its order against petitioners in the following language:

"It is ordered that the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Bros. on their sugar while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Bros. by said defendants are found by the commission in said report to be unduly discriminatory and in violation of the act to regulate commerce."

The leave granted by this court allowing the United States and the Federal Sugar Refining Co. to withdraw their answers and file motion to dismiss undoubtedly entitles them to be again heard as to whether the petition states a cause of action, although the record thus presented is a novel one. We certainly are in no position, after having denied the motions to dismiss and after the Supreme Court has affirmed our

action, so far as the granting of the temporary injunction is concerned, to now hold upon the same facts that the petitions do not state facts sufficient to constitute a cause of action, merely because the case is now submitted for final decision. We are of the same opinion, however, as when we denied the motions to dismiss on May 22, 1911, but as we did not at that time give the reasons which impelled us to make the decision then rendered, we can now with propriety state them.

The Interstate Commerce Commission in its report and order did not specify whether it found a violation of section 2 or section 3 of the act to regulate commerce. These sections read as follows:

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." * * *

The language used by the commission would lead to the inference that it found a violation of section 3. If the facts pleaded, however, show a violation of either of the above sections, the order must be sustained, and it must also be sustained if based upon a finding of fact, which we are not at liberty to review. In the first place, the case must be freed from matters which cloud the real issue. It is continually suggested that the arrangement between petitioners and the Jay Street Terminal may be a scheme to cover a rebate. We are not permitted to base our judgment on suspicion, but upon facts pleaded and proven. Respondents have been given ample opportunity to produce all evidence within their power for the purpose of showing that the payments made by petitioners to the Jay Street Terminal constitute unlawful rebates, but no such evidence has been produced. On the contrary, respondents withdrew their answers and now ask the court to decide the case upon the facts stated in the petition. Surely upon this record the court ought to be relieved of presuming that the contracts made by petitioners with the Jay Street Terminal are a cover for the payment of unlawful rebates.

Again, the performance of the Ben Franklin Transportation Co. at Pier 24, North River, is a play in which the episode is lost in the dénouement. It is a plain device and subterfuge indulged in on behalf of the Federal Sugar Refining Co. for the purpose of making it seem that sugar which is being lightered from Yonkers, N. Y., 10 miles north of the lighterage limits established by petitioners, was in fact shipped from Pier 24 by a delivery of the same at that point to the petitioners, when the uncontradicted record, as admitted by the motions to dismiss, shows that the petitioners have nothing to do with the sugar of the Federal Sugar Refining Co. until it reaches the New Jersey shore and is there delivered to petitioners. Courts of equity, looking through mere forms to the substance of things, can not, nor ought they be asked to, found their judgment upon a plain subterfuge. No sugar is tendered by the Federal Sugar Refining Co. to petitioners at Pier 24. On the contrary, the Ben Franklin Transportation Co., acting for the Federal Sugar Refining Co., refuses to tender it there and allow it to be taken by petitioners, but insists upon transporting it itself to the rail termini. The statement of facts makes it plain that the Federal Sugar Refining Co. transports its sugar direct from Yonkers to the Jersey shore, and we must find as a matter of law that the transportation of Federal sugar by petitioners does not commence until it is delivered to them at their rail termini. The facts do not bring the case within the ruling of the Supreme Court in Gulf, Colorado & Santa Fe Railway Co. *v.* Texas (204 U. S., 403).

We must indulge in the presumption that the commission found nothing unlawful in the payments made by petitioners to the Jay Street Terminal under the facts appearing in the record, or it would not have framed its order in the alternative. (Penn Refining Co. *v.* W. N. Y. & P. R. R. Co., 208 U. S., 208. East Tenn., etc., R. R. Co. *v.* Interstate Commerce Commission, 181 U. S., 1. Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 190 U. S., 273. Louisville & Nashville R. R. Co. *v.* United States, 197 Fed., 58–60.)

There can be no doubt as a matter of law under the facts admitted that transportation by petitioners of freight delivered to them at the Jay Street Terminal commences at said terminal and that the services performed by the Jay Street Terminal are transportation services. In our disposition of the case we make no distinction between the Jay Street Terminal and Arbuckle Bros., but treat them as the same entity in legal effect. It then appears that petitioners under their respective contracts are paying the Jay Street Terminal for a terminal service and also for the transportation of freight from the terminal to the Jersey shore. Providing this charge is reasonable, and there is no suggestion that it is not, we understand the law to permit such payment. (Central Stock Yards Co. *v.* L. & N. Railway Co., 192 U. S., 568. R. R. Com. of Ky. *v.* L. & N. Railway Co., 10 I. C. C. Rep., 173. Cattle Raisers Ass'n *v.* C., B. & Q. R. R. Co., 11 I. C. C. Rep., 277. Sec. 15, act to regulate commerce, as amended. Central Stock Yards Co. *v.* L. & N. Ry. Co., 118 Fed., 113; affirmed, 193 U. S., 568. Covington Stock Yds. Co. *v.* Keith, 139 U. S., 128. Butchers & G. Stock Yds. Co. *v.* L. & N. R. R. Co., 66 Fed., 35. United States *v.* Delaware, L. & W. Co., 40 Fed., 101. Consolidating Fordg. Co. *v.* Southern T. Co. et al., 9 I. C. C. Rep., 182. Excursion Car Co. *v.* Penn. R. Co., 3 I. C. C. Rep., 577. In re Transportation of Fruit, 10 I. C. C. Rep., 360. F. H. Peavey Co. *v.* Union Pac. R. Co., 176 Fed., 409; affirmed, 222 U. S., 42. Interstate Commerce Commission *v.* Diffenbaugh, 222 U S., 42.)

This case is in no way parallel to the case of Union Pacific Railway Co. *v.* Updyke (222 U. S., 15). The Jay Street Terminal is one of the public terminals of petitioners, and it is owned by Arbuckle Bros. The payments made by petitioners to the Jay Street Terminal are for the terminal and transportation services performed by it in connection with all freight shipped from or delivered to said Jay Street Terminal. It so happens that Arbuckle Bros., who own and operate the terminal, also are shippers, and only in this way can it be said that they receive payment for transporting their own sugar. In order to make the case parallel to the Updyke case, it would have to appear that the Federal Sugar Refining Co. also owned and operated for petitioners a public terminal for the receipt and delivery of freight within the lighterage limits and that the Federal Sugar Refining Co. had sugar of its own which it transported to the rails of petitioners, together with other freight. If the case stood in such position, under the Updyke case it might be necessary to hold that the petitioners must make the same payments to the Federal Sugar Refining Co. as to Jay Street Terminal. But the always-present fact is that the Federal Sugar Refining Co. does not own and operate any public terminal for petitioners, nor does it transport a pound of sugar from any terminal within the lighterage limits to the rail termini of petitioners. There is no room for the court to enforce equality between Arbuckle Bros. and the Federal Sugar Refining Co. as to payments for the transportation of their sugar, for the reason that the position in which the court finds the respective parties to the controversy will not permit. We find Arbuckle Bros. owning the Jay Street Terminal, used as a public terminal of petitioners within the lighterage limits. We find the Federal Sugar Refining Co., with its refinery at Yonkers, 10 miles north of the lighterage limits, owning and operating no public terminal for petitioners and tendering petitioners no freight at any of their public terminals. So that we can not see how any violation of either section 2 or section 3 can be predicated on the facts stated in the record.

But it is claimed that this is true: That it costs the Federal Sugar Refining Co. 3 cents per hundred pounds more to get its sugar to the Jersey shore than it does Arbuckle Bros. This could be avoided in part if the Federal Sugar Refining Co. would tender its sugar for shipment over the rails of petitioners at any of the terminals of petitioners within the lighterage limits, many of which are much nearer Yonkers than the Jay Street Terminal or even Pier 24, North River. And we must not forget in this connection that the Federal Sugar Refining Co. voluntarily located its refinery at Yonkers, and if it thereby has subjected itself to some natural disadvantage it can not call upon the courts to remedy it. The commission recognized this fact when it refused to compel petitioners to extend their lighterage limits so as to include the Federal sugar refinery. It is apparent from the record that the sole disadvantage of the Federal Sugar Refining Co. results from its location outside the lighterage limits, and that it is in no way injured or prejudiced by the fact that Arbuckle Bros. own the Jay Street Terminal.

For the reasons above stated we are of the opinion that the order of the commission was in excess of its power, and that it ought to be permanently suspended and enjoined. And it is so ordered.

Mack, Judge, dissenting:

The commission in its report does not clearly indicate whether it deems the transportation of the Arbuckle sugar to begin in New York or in Jersey City. It is conceded by counsel that this is a question of law to be determined by this court. As to goods shipped by Arbuckle Bros. to others than themselves as consignees, there would seem to be no room for doubt, for whatever may be the liability of the Jay Street Terminal toward such consignees, clearly the railroad companies are liable to them as common carriers at the latest from the time of the delivery of the goods into the cars and the issuance of the bill of lading in their name by their authorized agents in New York. I concur in the conclusion of the majority of the court that this transportation begins in New York.

As to the comparatively small percentage of shipments of which Arbuckle Bros. are the consignees as well as the consignors, this would seem to be equally true. The title thereto could be transferred by them immediately after the bills of lading are issued, and in that event the railroad companies would again clearly be liable as carriers to the assignees, even though the goods had not yet actually moved from New York. And the retention of title thereto by Arbuckle Bros. during the time that they, acting as agents for the railroad companies, are transporting them to Jersey City under the contract by which they agree to indemnify the railroad companies against their own acts, and thereby to release them, in a sense, from the obligations which they would ordinarily incur as common carriers toward the owners of goods carried, would not of itself change the transaction from a transportation service performed by the railroads through their agents, the shippers, into an accessorial service performed by the shippers solely on their own account, payment for which would be illegal, irrespective of any unjust discrimination that might result therefrom.

I concur, too, in the opinion of the majority of the court that Arbuckle Bros. and the Jay Street Terminal are to be treated as identical. When two individuals form two firms in which each is interested in the same proportions, the one to refine sugar, the other to operate a terminal station and to transport goods for railroads, the two firms do not thereby become so distinct and separate for every purpose as to legalize a payment to the latter firm for carrying the former's product, if such payment would be illegal as unjustly discriminatory when made directly to the former firm. The commission was, therefore, fully justified in this case in dealing with the two firms as one.

The question before this court then is, Could the commission reasonably find that payment to Arbuckle Bros. for getting sugar manufactured by them from a point within the lighterage limits to Jersey City; that is, for performing a part of the railroad companies' transportation service (a payment permitted by section 15 of the act, subject to regulation by the commission as to its reasonableness), would operate as an unjust discrimination against the Federal Sugar Refining Co. unless a similar payment were made to the latter company for getting sugar manufactured by it from another point within the lighterage limits to Jersey City?

If the Federal Co. had its refinery at Pier 24, and if Arbuckle Bros. operated their wharf only as a private and not as a public station, and if the allowance made to them for carrying their sugar to Jersey City were no more than the bare cost of the service, the commission would be justified in finding that a refusal to make a similar allowance to the Federal Co. and the offer to give it in lieu thereof free lighterage of its sugar would result in an unjust discrimination against the Federal Co. (Union Pacific Railroad Co. *v.* Updike Grain Co., 222 U. S., 215.)

Do the facts, first, that the Federal Co.'s refinery is at Yonkers, that it brings its goods to Pier 24 primarily or solely to get them within the lighterage limits, that it has never demanded and does not want free lighterage from Pier 24, and that as a result thereof the transportation of its goods by the railroads begins in Jersey City; or, second, that Arbuckle Bros. are employed by the carriers to operate their wharf as a public terminal station, and to transport therefrom to Jersey City not only their own but others' goods, necessarily render the circumstances such that the commission in the reasonable exercise of its powers could not find them to be substantially similar?

(1) If this case were based on the grant of free lighterage to Arbuckle Bros. and the failure to grant it to the Federal Co., the latter would, of course, have no ground for complaint unless it really wanted and

offered to avail itself of such free lighterage. But when, as here, the complaint is based on the grant to the one and the denial to the other of the privilege, not of free lighterage, but of itself performing for compensation the transportation service from within the lighterage limits to Jersey City, it is no answer to assert that at present the situation of the two parties is not similar, transportation for the one beginning at New York and for the other at Jersey City. The charge is that this dissimilarity is due not to the voluntary act of the parties but to the very discrimination sought to be removed as unjust, and that if the same privilege were granted the Federal Co. as is granted Arbuckle Bros.—that is, to transport its goods from a point in the lighterage limits to Jersey City in its own or hired lighters, not at its cost, but as the compensated agent of the railroads—it would be ready, willing, and able so to do.

If this court must find that there is no substantial basis for the commission's view that the Federal Co. was shipping and, on a grant of like privileges to those accorded Arbuckle Bros., would be ready to ship from Pier 24, if the facts stated in the petition necessarily lead to the conclusion that the shipment is and would be direct from Yonkers, a point without, and not from Pier 24, a point within the lighterage limits, to Jersey City, there would be an end of the case. I am of the opinion, however, that this court should not so hold.

The railroads are not concerned with the history of goods offered for transportation. (Interstate Commerce Commission *v.* D., L. & W. R. Co., 220 U. S., 235.) If parties are ready to perform for compensation that part of the service which the railroad companies by their offer to begin the carriage in New York instead of in New Jersey have made transportation service, it can not be material to the railroads how the goods get to the point where this service is to begin—whether it be by rail, barge, or wagon. The goods are to be tendered to them at that point. The only transportation with which we are here concerned, that by the railroads, is to begin there.

The barge that brings the Federal Co.'s sugar from Yonkers is tied up to the dock at Pier 24. The sugar is then just as much within the lighterage limits as if it were dumped out on the pier. When the barge is so tied up a shipper who wants to avail himself of the free-lighterage offer could assuredly do so. The railroads make this offer to the Federal Co. now, an offer which would be illegal if the goods could not be considered to be within the lighterage limits and if the interstate transportation necessarily began at Yonkers. If the refinery were situated in New York City, a few blocks off the water front on a small canal or creek large enough only for rowboats, the company clearly could bring its goods by such a boat to the dock and put them on lighters without first dumping them onto the dock.

Of course, at the present time the Federal Co. can not offer the goods to the railroads at Pier 24. As it does not want free lighterage, and as the railroads will not accept them at Pier 24 by issuing, through regular agents or through the Federal Co. itself, acting as their agent, the necessary bills of lading, and permitting the Federal Co. as their paid agent thence to transport them to Jersey City under covenants similar to those found in the Jay Street Terminal contracts, it would seem to be utterly useless for the Federal Co. to do anything more than it is doing. It says: "Our sugar is at Pier 24; it is already loaded in lighters; we want bills of lading for the through transportation from this point, and we demand, for similar compensation, the privilege of performing a part of the transportation service, that between the lighterage point, Pier 24, and Jersey City, a privilege substantially similar to that which you grant Arbuckle Bros."

In the opinion filed by the commission in the original case brought by the Federal Co., involving only the extension of the lighterage limits and based primarily on an alleged violation of section 3 of the act, importance was attached to the concession of counsel that the Federal Co. would not be any better off if the Jay Street Terminal were owned by the railroad companies, with the implication that in that event the allowance would be cut off and only free lighterage granted. The refinery at Yonkers would, of course, always be under the disadvantage of having to bring its goods to Pier 24.

The present proceeding, however, was brought by the Federal Co. not in the capacity of Yonkers refinery, primarily to prevent, as between localities, the undue prejudice forbidden by section 3, but in its capacity of a vendor and shipper of sugar from Pier 24, primarily to prevent as against it the unjust discrimination forbidden by section 2 of the act. Only in that capacity is it to be dealt with in this case, and therefore it is immaterial how, whence, or at what cost it gets its sugar to that pier.

(2) Can parties guilty of what would otherwise be an unjust discrimination escape the consequences of their act by combining the payment for the transportation service with payment for other work that in and of itself has no necesary connection therewith?

That Arbuckle Bros. run a public wharf as agents of the railroad companies, that their compensation is a combination of rent and wages as terminal managers and transporters, that the amount paid per 100 pounds for sugar may be far beyond a fair payment for that particular service, and may be made so because a similar payment per 100 pounds may be far below a fair payment for similar services as to other goods, do not, in my judgment, necessarily render the circumstances surrounding the transportation of the sugar to Jersey City so dissimilar from those at Pier 24 as to justify this court in holding that the commission, in the reasonable exercise of its powers, could not find that an unjust discrimination resulted from the payment to Arbuckle Bros. and the refusal to make a similar payment to the Federal Co. If the commission could reasonably so find, its order can not be annulled merely because the members of this court might have reached a different conclusion had they been acting as commissioners.

The fact that the contracts between the Jay Street Terminal and the railroads, by which the Arbuckle private docks were made public terminal stations and these allowances were definitely fixed, were made during the session of Congress which enacted the Hepburn Act, a law which aimed more effectively to prevent certain illegal practices theretofore secretly indulged in for the benefit of large and favored shippers, and the further fact that the ultimate destination of the goods determined the rate of payment, although the services in each case were absolutely identical, lends support to the conclusions of the commission that the allowances are a mere disguise to conceal unjustly discriminatory and therefore illegal payments.

In my judgment, the petition should be dismissed for want of equity.

Mr. SIMPSON. I also offer in evidence the opinion of the Supreme Court in the fuel rate case, which will have to be copied out of the book I have here, which comes from the library connected with the Senate. It is Two hundred and twenty-fifth United States, page 326.

The opinion referred to is as follows:

[U. S. S. Exhibit AAA.]

SUPREME COURT OF THE UNITED STATES.

(No. 719.—October term, 1911.)

The Interstate Commerce Commission and the United States, appellants, *v.* The Baltimore & Ohio Railroad Co., the Pennsylvania Railroad Co., et al. Appeal from the United States Commerce Court.

(June 7, 1912.)

The question in the case is whether railroad companies may charge a different rate for the transportation of coal to a given point to railroads than to other shippers, the coal being intended for the use of the railroads as fuel.

The Interstate Commerce Commission held that a charge of a different rate was an unlawful discrimination against other shippers and made an order requiring a cessation of such charge. The execution of the order was enjoined by the Commerce Court.

A number of railroads are petitioners and we shall refer to them as the companies.

The companies attack in their petition the order of the Interstate Commerce Commission on several grounds, which may be summarized as follows: The movement of coal traffic from the point of origin to the point or points of junction to receiving carriers is different from the movement of coal to be delivered locally at such junction points.

The traffic is not governed by the rates published under the act to regulate commerce which apply to the traffic in coal not intended for use by consuming railroads, because the charges go to the carrier itself. If the coal be shipped under a through rate applicable to other coal the actual rate upon which it moves to the rails of the consuming road is the division of the through rate going to the roads over which the traffic moves to the junction point with the rails of the consuming road. The division of the rate beyond that point goes to the consuming road itself.

All but an inconsiderable part of such coal is necessary and intended for use as fuel in locomotives. The fueling stations are often many, and are located at convenient points along the line at varying distances from the junction points, and it is not possible at the time of shipment to tell at what point a carload of coal will be needed. If made on a through rate they must be billed and transported to a point to which the through rate is published. Even if a centrally located distributing yard for fuel be established, and all shipments billed on a through rate to that yard, there must be a reverse movement of the coal between that point and the point of junction.

The fact that fuel coal on the line of a consuming carrier is not governed by the published rates makes the commercial competitive conditions different between such coal and other coal. The value to the shipper is not the same or measured by the same conditions. There is no competition between the fuel coal and other coal.

Because of the circumstances and conditions differentiating the traffic in fuel coal the companies have for a number of years past published and filed, as required by law, separate tariffs of the rates to be charged and received by them for the transportation of such coal from points of origin to the junction point of delivery to the consuming carrier. The tariffs vary in their definitions or descriptions of the traffic to which the rates apply, but in each case the traffic is such that it would move in reality not under the published through rates but would move under the special conditions which have been stated. Some of the tariffs apply only to coal intended for use and used for locomotive fuel. The rates named in the tariffs are open and available to all producers and shippers, if the shipments be made under the special conditions stated.

On January 4, 1910, the Interstate Commerce Commission, of its own motion, instituted an inquiry under an order of that date entitled, "In the matter of restrictive rates," docket No. 3053, making the Baltimore & Ohio and the Pennsylvania Railroad Cos. parties to the proceeding. The other companies from time to time were admitted as interveners. Testimony was taken, argument heard, and the commission entered the order complained of in which the commission required the companies to cease and desist, on or before May 15, 1911, and for a period of two years to abstain from using the tariffs on fuel coal stated.

The commission erred in its construction of the act to regulate commerce in that it held the facts and circumstances found by it did not distinguish fuel coal from other coal, and that the different conditions of their transportation were not in law circumstances and conditions necessary or proper to be considered in applying the provisions of section 2 of the act.

The commission erred in holding that the rates on fuel coal under section 2 should be no more nor less than rates for the shipment of other coal from the same point of origin for local delivery at the junction point, the circumstances and conditions showing conclusively that the services done in the transportation of them, respectively, are not alike nor substantially similar, within the meaning of the act to regulate commerce.

The commission erred in holding that fuel coal should be transported under through rates, as other coal, and that it was unlawful for carriers to publish or charge any rates other than the through rates agreed upon going to the line of the terminal carrier to be used by it in its business as a common carrier. And that, as the charges on such terminal carrier's line must be borne by it, the commission erred in holding that such circumstance did not differentiate the traffic in such coal from the traffic in other coal, and did not constitute a substantial difference under section 2 in the conditions of transportation.

The commission erred in holding, further, that any difference in the tariff for fuel coal and not applicable to all other coal was unjustly discriminatory, in violation of section 3.

It appears on the face of the report of the commission, it is alleged, that it proceeded in making the order upon its view of sections 2 and 3; that it did not find it necessary to consider any specific tariff or tariffs or the rates named thereby; that the difference in conditions affecting the respective tariffs could not be considered as distinguishing them. And it is alleged that the findings of the commission are findings of law, as well in regard to the violation of the third section of the act as in regard to violation of the second section. Irreparable damage is alleged, and the alternatives presented of desisting from the carriage of fuel coal at the expense of the loss of large and valuable revenues or accepting divisions of through rates on both fuel coal and other coal, which will give the companies, as originating or intermediate carriers, a much lower compensation for both classes of traffic than they are now receiving and would continue to receive but for the order of the commission.

In either case the loss will amount to many thousand dollars. There will be loss, it is alleged, to the producers of fuel coal who have

sold coal under contracts for future delivery at junction points, and loss also to producers and shippers who depend on the railroad-fuel business to enable them to operate their mines at all.

A final decree is prayed for the annulment of the order and a temporary injunction enjoining and suspending it pending final hearing and determination.

The petition was supported by affidavits made by a number of coal producers and shippers.

The answer of the Interstate Commerce Commission is directed principally at the third paragraph of the petition, and charges against it as follows: Its allegations relate to comparisons between coal, on the one hand, consigned to a railroad company, and coal, on the other hand, consigned to some other party. The former is called railroad-fuel coal; the latter is known as commercial coal. In each instance, however, regardless of the consignee, the point of origin and the point of destination of the shipments is the same, but the rate charged for transporting fuel coal is much less than the rate exacted for the transportation of commercial coal over the same line, in the same direction, and between the same points. Schedules or tariffs providing for such differences in rates have been heretofore established and put in force and are now maintained and enforced by the companies.

Where the destination is a junction which is a point of connection between the lines of two or more of the companies, the movement of coal, fuel and commercial, is the same, except that at such destination the cars containing fuel coal are ordinarily placed upon what is called an exchange track, which is used in common by the connecting carriers, while the cars containing commercial coal are usually placed upon the side track of the delivering carrier. The cost of delivering both kinds of coal is practically the same, depending upon the nature of the delivery facilities furnished by the companies. Therefore, the cost of delivering fuel coal may be and is less than the cost of delivering the commercial coal, but the reverse is sometimes the case. It is alleged, however, that such differences are similar to differences pertaining to some shipments of commercial coal compared with other shipments.

Generally what is called "free time" is allowed by the companies; that is to say, a certain period of time for unloading the coal is allowed. If the coal is unloaded within that time, no charge is made for the use of the car. If that time be exceeded, a charge of $1 for each day or fraction of a day in excess of the "free time," known as a demurrage charge, is exacted by the companies, while the compensation paid by one carrier to another carrier for the use of a car owned by the latter is 25 cents a day. Where the coal transported is fuel coal no "free time" is allowed, nor is such demurrage charge exacted or collected. These differences, however, are offset, and much more than offset, by the differences in the rates of transportation between the different coals.

Where the destination of the shipment of coal is not a point of connection between the lines of two or more of the companies the circumstances and conditions pertaining to the transportation and delivery of coal are the same as above described, except that at such destination there are no exchange tracks used in common by two or more of the companies. Where the shipment passes over more than one line of railway to such destination, delivery by one of the companies to another is made in the same way and under similar circumstances and conditions, regardless of whether the coal be fuel or commercial.

The lower rates established by the companies and applied by them to the transportation of fuel coal are not open alike to all shippers, but are, by reason of the schedules and tariffs above mentioned and by reason of the practices of the companies, confined to shippers of fuel coal and denied to shippers of all other coal, including commercial coal.

The commission denies the errors attributed to it, and alleges that its report shows as follows: "We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination."

The commission alleges (somewhat singularly, on information and belief) that it considered all facts, circumstances, and conditions pertinent to the subject matter of the order, including degrees of difference and distinction, and each and all of the tariffs and rates of the companies which are affected by the order, and did not entertain the opinion attributed to it, that the facts, circumstances, and conditions affecting the particular traffic could not be lawfully considered by it as distinguishing the traffic in railroad-fuel coal from the traffic in other coal.

It is alleged that the traffic is interstate, and that fuel coal as compared with other coal, including commercial coal, is a like kind of traffic; that the services performed by the companies in connection with the transportation of fuel coal as compared to the services performed by them in connection with the transportation of other coal, including commercial coal, are alike and contemporaneous, and are performed under substantially similar circumstances and conditions. It is hence alleged that the companies are violating sections 2 and 3 of the interstate-commerce act.

The final allegation of the commission is that the matters are within its jurisdiction, and that therefore the correctness of its findings is not open to review in the Commerce Court or any other court.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The case involves the consideration of sections 2 and 3 of the interstate-commerce act. Section 2 provides that if any common carrier shall directly or indirectly charge or receive from any person or persons a greater or less compensation than it charges or receives from any other person or persons "for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under sustantially similar circumstances and conditions, such common carrier shall be deemed guilty of discrimination. * * *."

Section 3 is directed against giving preferences or advantages to persons, localities, or descriptions of traffic in any respect whatsoever and subjecting any person, locality, or traffic "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The companies contend that the commission applied these sections to the facts found by the commission, none of them being disputed, and that, therefore, the findings of the commission are conclusions of law. On the other hand, the commission charges that its findings are those of fact and exclusively within its jurisdiction, and not open to review by the Commerce Court or any court. Many of its assignments of error are expressions of this view. The other assignments assert in various ways and with many shades of particularity that the Commerce Court erred in disagreeing with the commission in regard to the traffics in the different coals, not only in its decision, as indicated in its injunction, in the matters affecting such traffic, but in substituting its judgment for that of the commission.

The facts are certainly undisputed, or, to put it differently, the circumstances and conditions which determined the order are certainly not in controversy; and while certain general inferences are disputed which may be called inferences of fact, yet we think "power to make the order, and not the mere expediency of having made it, is the question" presented. (Interstate Commerce Commission *v.* Illinois Central R. R. Co., 215 U. S., 452, 470.) In other words, that the question presented by the petition is that the order of the commission was not merely administrative, but proceeded from a construction of sections 2 and 3 as applicable to the conditions which affected the traffic in the different kinds of coal and that the different charges for transportation constituted violations of those sections. The Commerce Court, therefore, had jurisdiction of the petition and jurisdiction to enjoin the order of the commission if the court considered that the order would cause irreparable injury. Section 3 of the act creating the Commerce Court gives that court the power to "enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission, in a suit brought in the court against the United States." Whether the court erred in its judgment is now to be inquired into.

In its most abstract form the simple statement of the controversy is whether the companies may charge a different rate for the transportation of fuel coal to a given point than for the transportation of commercial coal to the same point. But when we depart from the abstract, complexities appear and attention is carried beyond the consideration of points equally distant, shippers equally circumstanced and traffic affected by similar circumstances and conditions. It is asserted that there are disparities between the traffics and qualifying circumstances which the commission disregarded and, in error, held that traffic in fuel coal should not be distinguished from the traffic in commercial coal.

The commission insists upon the simplicity of the problem and contends that there is nothing in the conditions of the traffic which dispenses with the clear legal duty of the companies under the interstate commerce act to carry for all shippers alike. The commission says: "We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination." Its position thus expressed the commission has supplemented, we are told by the companies, by its conference ruling No. 324, published June 19, 1911, as follows: "Division on company coal.—Upon inquiry, held that it is unlawful for carriers to make special and discriminatory divisions of joint rates upon locomotive fuel as between an originating or participating carrier and a purchasing carrier. In the division of joint rates a railroad must be treated precisely as any other shipper is treated, and the commission will regard any special division as a device to defeat the published rate. All divisions upon fuel coal must be made in good faith without respect to the fact that one of the carriers is the purchaser of such coal."

The issue of principle between the commission and the companies is very accurately presented, and we come to consider whether there are differences in the traffic of fuel coal which distinguish it from traffic in commercial coal, and which, as contended by the companies, make the traffic dissimilar in circumstances and conditions, or whether the opposite is true, as decided by the commission.

The circumstances and conditions which may so far be considered as distinguishing traffics so as to take from different transportation charges the vice of preference have been described by this court. In Wight *v.* United States (167 U. S., 512, 518) it is said: "It was the purpose of the section (2) to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor." These words are given more precision by the declaration "that the phrase, 'under substantially similar circumstances and conditions,' as found in section 2, refers to matters of carriage, and does not include competition." And this was repeated in Interstate Commerce Commission *v.* Alabama Midland Railway Co. (168 U. S., 161, 166). The facts in both cases give significance to the rulings. In the first case the charges to the shippers were the same, but one was given extra facilities; in the second case the extraneous effect of competition was excluded as an element in the application of the section. There is also example in Interstate Commerce Commission *v.* Delaware, Lackawanna & Western Railroad Co. (220 U. S., 235). It was there held that a carrier could not look beyond goods tendered to it for transportation in carload lots "to the ownership of the shipment" as the basis for determining the application of its established rates. Do the circumstances and conditions in this case give a greater power of discrimination and justify the lower charge to railroad-fuel coal? It is admitted that the fact that a railroad is the shipper or consumer is not a circumstance or condition that affects the carriage, nor can the different uses to which the coal may be put, and it would seem necessarily that any other extraneous condition or circumstance could have no greater potency. Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before, or their attitude and interest after, transportation? It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges. (See Pennsylvania Railroad Co. *v.* International Mining Co., 173 Fed., 1.)

But what are the differences in the traffics which are asserted by the companies? We have already condensed them from the pleadings, but we may use the expression of their ultimate elements by the companies, omitting, for the time being, the physical differences in facilities. They say: "When the railroad-fuel coal is consigned to the junction point, as provided in the present system of tariffs, the circumstances and conditions that differentiate this traffic from the traffic in commercial coal consigned to the same point are:

"1. The fuel coal so shipped is not in competition with the commercial coal consigned to the same point.

"2. It is in competition with other coals coming upon the line of the consuming road at other points with which the commercial coal is not in competition.

"3. The transportation service is different in that commercial coal at the junction point has reached the point of use, while railroad-fuel coal reaching the consuming railroad at the junction point is still subject to a transportation service before reaching the point of use—a transportation under the 'commodities clause' and not under tariff."

These elements the commission disregarded, it is contended, and that while it found a similarity in the traffics it did not consider or discuss the two most important features of difference—"the two features" which make the traffics unlike; that is, that railroad-fuel coal "does

not come into competition with the commercial coal, and is in competition with coals coming on the railroad's line at other points." But such features do not affect the carriage, quality, or alter the essential service, which is to get an article from one place to another. The greater or less inducement to seek the service is not the service. Such competition, therefore, is as extraneous to the transportation as the instances in the cases cited. And equally so is the other "feature," that the fuel coal may be destined for consumption beyond the junction point. The circumstances do not alter the fact that it and commercial coal go to the same point and are delivered at the same point. There is, it is true, a difference in the manner of delivery, depending upon the difference in the facilities possessed by the railroads and other consignees.

The commission, as we have seen, especially disclaimed holding that the rate to the junction point must be paid on shipments going beyond that point, and insisted that it only held that the charges to that point should be the same to all shippers, and rates through that point should also be the same to all shippers. And the commission said that the testimony established that the service as to the coals was alike when they go beyond the junction point. The commission, therefore, considered alone the service, disregarding circumstances and conditions which were mere accidents of it and had relation only to the respective shippers.

But the companies say, in criticism of the reasoning and order of the commission, they are permitted to do indirectly what they want to do directly, that an easy way of evasion of the prohibiting order is to make a joint rate from the point of origin of the fuel coal to its points of consumption, and thereby be enabled "to charge a lower rate for the fuel coal than for the commercial coal between the same points." And further, in display of the easiness with which this can be accomplished and "how readily the commission's order lends itself to manipulation of rates," they say that they have only to publish a nominal delivery point beyond the real delivery point, publish a rate to that point which they do not intend to charge and call their actual rate to the junction point, based on the special circumstances and conditions, a "division." They then ask if "the commission can so easily juggle a rate for a good purpose, will not ingenious traffic agents and coal operators do the same for their own perverse ends?" If such a situation artfully produced be used as a device for giving preferences, the commission might be able to find some means to defeat it. At present we must regard its possibility as relevant as exhibiting a misconception of the commission's purpose. The commission has not said what the rate should be, nor has it said, as we have seen, that the local rate to the junction point should be the same as the rate beyond that point. The commission has ordered equality and struck down what it deemed to be preferential charges, even though they were made under formal tariffs. If there may be legal or illegal evasion of the order, we may wonder at the controversy. If the difference between the effect of the order and what the companies can do or want to do, be, as is contended, a "question of words"—a "question of the nomenclature to be used in tariffs"—the order of the commission may still be valid. Tariffs are but forms of words, and certainly the commission, in the exercise of its powers to administer the interstate commerce act, can look beyond the forms to what caused them and what they are intended to cause and do cause.

There are other contentions or rather phases of those that we have considered and which seek to further emphasize the strength of competition as a circumstance or condition differentiating the traffic. For instance, it is urged that the shipment of the fuel coal to a particular railroad "for the use of that railroad" makes special the traffic. And, further, that "a railroad is not a person," but is "rather in the nature of a geographical division and extends through long distances." Pushing the argument or illustrations further, it is urged that a railroad company may be distinguished from the physical thing, the railroad itself, and may be a locality where a commodity is used, like "a river, a county, or a city," and be entitled to preferential rates to accommodate competitive conditions. The Import Rate Case (162 U. S., 197) is invoked as analogous. We can not accept the likeness nor the distinctions which are said to establish it. The railroad company can not be put out of view as a favored shipper, and we see many differences between such a shipper receiving coal for use in its locomotives and a nation as the destination of goods from other nations for distribution throughout its expanse on through rates from points of origin.

The point is made that "the commission's method of filing fuel-coal rates is illegal under section 6 of the interstate commerce act and under the Elkins Act," and the later act and section 6 are quoted in illustration. The rather vague argument which is urged to support the point lands in the proposition that the right to violate the law as to preference in rates is justified by the law in its requirement of the filing of schedules of rates However, counsel say that "it all goes back to the same principle" "dealt with under point 1." We have sufficiently discussed point 1.

The decree of the Commerce Court is reversed and the case remanded with directions to dismiss the petition.

True copy.

Test.

_____, *Clerk Supreme Court, United States.*

Mr. SIMPSON. I also offer in evidence, but I do not care to have it even printed in the RECORD, the record in the circuit court of appeals in the Marian Coal Co. against Peale, having taken therefrom the whole of the evidence that was objected to when it was suggested before.

[The matter was marked "U. S. S. Exhibit ZZ."]

Mr. SIMPSON. I also offer in evidence a certificate from the District Court of the United States for the Middle District of Pennsylvania, showing all the cases which appeared in that court in which the Lehigh Valley Coal Co. or Lehigh Valley Railroad Co. were parties interested during the time Judge Archbald was a member of that court.

The certificate referred to is as follows:

[U. S. S. Exhibit BBB.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

I, G. C. Scheuer, clerk of the above-named court, do hereby certify that the docket entries in the cases hereto attached are the only cases in which the Lehigh Valley Railroad Co. or the Lehigh Valley Coal Co. is a party which were pending during the term of Hon. R. W. Archbald as judge of the District Court of the United States for the Middle District of Pennsylvania.

Witness my hand and the seal of said court, this 27th day of November, A. D. 1912.

[SEAL.] G. C. SCHEUER, *Clerk.*

The following is a part of the docket entries:

In re Bunnie S. Harris *v.* Lehigh Valley Coal Co. No. 9, October term, 1904.

For plaintiff: Watson, Diehl & Kemmerer, Scranton, Pa.

For defendant: Woodward, Darling & Woodward, Wilkes-Barre, Pa.; Willard, Warren & Knapp, Scranton, Pa.

September 15, 1904. Præcipe for summons in assumpsit and plaintiff's statement. Summons issued returnable first Monday of October next.

September 22, 1904. Summons returned served.

September 28, 1904. Præcipe for appearance of Woodward, Darling & Woodward for defendant.

October 16, 1905. Amendment to plaintiff's statement (allowed).

November 28, 1905. Additions and amendments to plaintiff's statement.

March 5, 1906. Continued on account of plaintiff's sickness.

October 15, 1906. Continued to October 22, 1906.

March 4, 1907. Jury called and sworn.

March 18, 1907. By agreement, a juror is withdrawn and the case is continued to February term, 1908.

Certified from the record this 27th day of November, 1912.

[SEAL.] G. C. SCHEUER, *Clerk.*
Per S. W. HOFFORD, *Deputy Clerk.*

Now, 27th March, 1908, the above case is hereby discontinued.

WATSON, DIEHL & WATSON,
Attorneys for plaintiff.
J. B. WOODWARD,
For defendant.

Certified from the record this 27th day of November, 1912.

[SEAL.] G. C. SCHEUER, *Clerk.*
Per S. W. HOFFORD, *Deputy Clerk.*

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IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

In re Robert Smallcomb *v.* Lehigh Valley Railroad Co. No. 115, October term, 1907.

DOCKET ENTRIES.

October 9, 1907. Præcipe for summons in trespass and statement. Summons issued returnable first Monday of November, next.

October 16, 1907. Summons returned served and filed.

October 18, 1907. Præcipe for appearance of Willard, Warren & Knapp, for defendant.

November 13, 1907. Plea: "Not guilty."

January 25, 1908. Affidavit of E. N. Willard. Order of court allowing the withdrawal of plea of "Not guilty" and filing plea in abatement. Plea in abatement.

February 20, 1908. Depositions.

February 28, 1908. Jury called and sworn (see minutes).

March 11, 1908. Jury called and sworn (see minutes).

March 12, 1908. Juror withdrawn and case settled.

April 14, 1908. Order of court directing that case be marked discontinued. Discontinued.

Certified from the record this 27th day of November, 1912.

[SEAL.] G. C. SCHEUER, *Clerk.*
Per S. W. HOFFORD,
Deputy Clerk.

—

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

In re Charles D. Keating *v.* Lehigh Valley Railroad Co. No. 146, October term, 1908.

DOCKET ENTRIES.

July 11, 1908. Præcipe for summons in trespass and statement. Summons issued returnable first Monday in August, next.

July 14, 1908. Summons returned served and filed.

August 3, 1908. Præcipe for appearance of Willard, Warren & Knapp, Esqs., for defendant.

August 14, 1908. Plea: "Not guilty."

September 30, 1908. Præcipe for appearance of M. J. Martin, Esq., for plaintiff.

October 20, 1909. Depositions of William Simons and Walter T. Sullivan, taken before May Thornton, a notary public, etc.

October 22, 1909. Jury called and sworn.

October 26, 1909. Verdict for defendant.

Certified from the record this 27th day of November, 1912.

[SEAL.] G. C. SCHEUER, *Clerk.*
Per S. W. HOFFORD,
Deputy Clerk.

Mr. SIMPSON. I also offer in evidence a letter from Judge Mack to Mr. Bruce, dated December 12, 1911, and the reply of Mr. Bruce to Judge Mack, dated December 15, 1911, in relation to the Louisville & Nashville case, and the reply of Judge Mack to Mr. Bruce, dated December 22, 1911.

Mr. Manager STERLING. Those letters we ask to have read, Mr. President.

Mr. SIMPSON. Very good, sir. Before I offer any others, then, I will wait until they are read.

The Secretary read as follows:

[U. S. S. Exhibit CCC.]

UNITED STATES COMMERCE COURT,
Washington, December 12, 1911.

HELM BRUCE, Esq.,
Lincoln Bank Building, Louisville, Ky.

DEAR MR. BRUCE: In the testimony before the commission in the New Orleans-Mobile-Montgomery case Mr. Compton stated that he would furnish a copy of the Cooley adjustment of 1886. I can find nothing

of this kind in the files. If you can secure me a copy of the Ogden and Cooley reports I should be greatly obliged to you.

Very truly, yours,

JULIAN W. MACK.

JWM/AHM

—

[U. S. S. Exhibit DDD.]

DECEMBER 15, 1911.

Hon. JULIAN W. MACK,
Judge of the United States Commerce Court,
Washington, D. C.

MY DEAR JUDGE: I have yours of the 12th instant referring to Mr. Compton's testimony before the commission in the New Orleans-Mobile-Montgomery case and in which you call attention to the fact that he said he would furnish a copy of the Cooley adjustment of 1886, but that you can not find it.

You will find the Ogden and Cooley awards set forth in full in the testimony in the present case before the examiner of the circuit court, first, in the testimony of T. C. Powell, page 26, beginning at line 20, and then again in the testimony of Mr. C. B. Compton, page 152, line 1, etc.

But thinking it possible, as there are five judges of the Commerce Court, that you may not have the entire record before you, I inclose you a copy of the two awards.

Yours, very truly,

HELM BRUCE.

HB–W.

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[U. S. S. Exhibit EEE.]

(The Northwestern Mutual Life Insurance Co., M. W. & R. W. Mack, general agents for Hamilton County, Ohio. J. W. M. Traction Building, Fifth and Walnut Streets, Cincinnati.)

DECEMBER 22, 1911.

HELM BRUCE, Esq.,
Lincoln Bank Building, Louisville, Ky.

DEAR MR. BRUCE: Thanks for your letter and the inclosure. It has been some time since I went through the testimony in the circuit court, and when I wrote you I had forgotten that this material was there. I had been going again through the testimony before the commission and had failed to find it and had therefore made the request.

Thanking you for your courtesy, I am,

Very truly, yours,

JULIAN W. MACK.

Mr. SIMPSON. I also offer in evidence, sir, a letter from Mr. Bruce to Mr. Worthington, which was produced before the Judiciary Committee and kindly produced by the managers the other day at our request. That is the one Judge CLAYTON handed to me the other day.

Mr. Manager STERLING. We object to this—a letter written by Mr. Bruce to Mr. Worthington.

Mr. WORTHINGTON. This is a letter that Mr. Bruce wrote to me just after he had been examined as a witness before the Judiciary Committee, in which he makes some statements that he evidently wished to reach the committee in regard to this correspondence which he had with Judge Archbald. I turned it over to the committee, and it remained in their possession until it was produced here at our request. I think under the circumstances the Senate ought to have the benefit of Mr. Bruce's statement, which he made to the Judiciary Committee at the time in explanation of this transaction.

The PRESIDENT pro tempore. Does counsel claim that it is admissible under the rules of evidence?

Mr. WORTHINGTON. I could hardly say it is strictly admissible, but I think, under the rules under which we have admitted some papers here, in general fairness to everybody it might go in.

My attention is called to the fact that in his testimony here Mr. Bruce was asked about that letter, and he said:

I think the facts I stated in that letter are material, if I may be permitted to say so, to this matter you have under consideration, because it states the attitude of the parties upon the question on which Judge Archbald wrote to me.

So it was referred to and made a part of his testimony here.

The PRESIDENT pro tempore. The Chair does not feel at liberty to admit a document if it is not regarded as legitimate evidence. Of course, if the Senate desires to receive it, it is in its power so to direct.

Mr. Manager WEBB. Mr. Bruce has been on the witness stand since writing the letter, and he could have been interrogated about it if it was desired to do so.

Mr. SIMPSON. Mr. WEBB forgets that the letter was mislaid by Judge CLAYTON and was not produced until next morning. It was no fault of Judge CLAYTON, and I am not making any complaint, but we did not have it here when we wanted it for that purpose.

Mr. Manager CLAYTON. In reply to that, I may say that when counsel asked me for the letter I produced it as soon as possible. Mr. Bruce had not left the city. It is a matter which has no proper relation to the case, anyway.

Mr. SIMPSON. I do not think it is admissible evidence if it is objected to, and I can not insist on it.

The PRESIDENT pro tempore. The Chair would have no right to admit it.

Mr. SIMPSON. I offer in evidence the opinion of the Interstate Commerce Commission in the Louisville & Nashville Railroad Co. case, referred to by Judge Archbald while upon the stand.

The PRESIDENT pro tempore. Does counsel desire to have it read?

Mr. SIMPSON. I do not think it is necessary to have it read at this time.

The PRESIDENT pro tempore. It will be incorporated in the record without being read.

The opinion referred to is as follows:

Before the Interstate Commerce Commission.

New Orleans Board of Trade (Limited) *v.* The Louisville & Nashville Railroad Company. Nos. 1310, 1313, and 1328.

Submitted February 10, 1909. Decided November 26, 1909.

REPORT AND ORDER OF THE COMMISSION.

1. Defendant advanced its rates on certain classes from New Orleans to Mobile and Pensacola to make the sums of the locals equal the through rates from New Orleans to Montgomery, Selma, and Prattville, via Mobile and Pensacola: Held, That the rates resulting from said advance were unjust and unreasonable.

2. Former rates have been in effect, substantially unchanged, for over twenty years, and there was no evidence that they were not compensatory.

3. Neither by comparison with other rates nor by any facts appearing are the advanced rates shown to be reasonable.

4. The through rates from New Orleans via Mobile and Pensacola to Montgomery, Selma, and Prattville on certain classes held to be unreasonable and excessive and reduced to the sum of the locals.

John A. Smith, for complainant.

Ed. Baxter, W. G. Dearing, and Sloss D. Baxter, for defendant.

REPORT OF THE COMMISSION.

Clements, commissioner:

On August 13, 1907, the defendant advanced its rates on certain classes from New Orleans, La., to Mobile, Ala., and Pensacola, Fla., and on the same date a revision of the tariffs of said defendant became effective, which resulted in an increase of rates upon certain commodities and a decrease in rates upon certain other commodities from the same point of origin to the same destinations.

The complainant attacks the advanced rates on traffic to each of these destinations in separate proceedings as unreasonable and unjust in and of themselves, and as unduly prejudicial to the commercial interests of the city of New Orleans and its merchants.

The complainant also attacks, in a separate proceeding, the through rates from New Orleans to Montgomery, Selma, and Prattville, Ala., on substantially the same grounds.

The defendant, admitting the advance in its rates substantially as alleged, denies that they, or any of them, are unreasonable or unjust.

The three cases are interdependent, in that attack upon the local rates from New Orleans to Mobile and Pensacola, respectively, involves the through rates from New Orleans to Montgomery, Selma, and Prattville, and the attack upon the said through rates from New Orleans to these Alabama destinations involves the local rates from New Orleans to Mobile and Pensacola. The three cases were heard together and will be disposed of in a single report.

The advances in the class rates to Mobile and to Pensacola, respectively, as follows:

Local rates.

NEW ORLEANS TO MOBILE.

	Class.												
	1	2	3	4	5	6	A	B	C	D	E	H	F
August 13, 1907	50	39	38	31	27	16	12	15	12½	10	20	18	25
Prior to August 13, 1907	50	37	25	18	15	15	12	15	12½	10	15	18	25
Advance	....	2	13	13	12	1	....	....	.....	....	5	....	....

NEW ORLEANS TO PENSACOLA.

August 13, 1907	55	45	38	31	27	16	18	18	15	13	25	25	30
Prior to August 13, 1907	55	45	35	25	20	15	18	18	15	13	25	25	30
Advance	....	....	3	6	7	1	....	....	.....	....	....	....	....

Freight transported over defendant's lines from New Orleans to Montgomery, Selma, and Prattville, and adjacent territory basing upon these points, is routed via Mobile or Pensacola, and prior to August 13, 1907, defendant's through rates from New Orleans to said points, in certain instances, exceeded the sum of the locals from New Orleans to Mobile or Pensacola added to the local rates from these points to Montgomery, Selma, and Prattville.

The excess of the through rates over the sums of the locals was exactly identical in each instance with the advances as shown by the above tables, namely, in classes 2, 3, 4, 5, 6, and E to Mobile, and in classes 3, 4, 5, and 6 to Pensacola.

The following table shows the difference between the through rates and the combinations prior to said advances:

Table of rates.

NEW ORLEANS TO MONTGOMERY AND SELMA, VIA MOBILE.

	Class.												
	1	2	3	4	5	6	A	B	C	D	E	H	F
Through	89	79	68	55	47	36	24	27	20	16	44	35	32
Combination	100	77	55	42	35	35	27	35	26½	22	39	37	55
Advance	.....	2	13	13	12	1	....	....	.....	....	5	....	....

Table of rates—Continued.

NEW ORLEANS TO MONTGOMERY AND SELMA, VIA PENSACOLA.

	Class.												
	1	2	3	4	5	6	A	B	C	D	E	H	F
Through	89	79	68	55	47	36	24	27	20	16	44	35	32
Combination	105	85	65	49	40	35	33	38	29	25	49	44	54
Advance	.....	.....	3	6	7	1	.....	.....	.....	.....	.....	.....	.....

NEW ORLEANS TO PRATTVILLE, VIA MOBILE.

Through	101	89	76	63	55	44	29	32	25	21	49	40	42
Combination	112	87	63	50	43	43	32	40	31½	27	44	42	65
Advance	.....	2	13	13	12	1	.....	.....	.....	.....	5	.....	.....

NEW ORLEANS TO PRATTVILLE, VIA PENSACOLA.

Effective Aug. 13, 1907	117	95	76	63	55	44	38	43	34	30	54	49	70
Prior to Aug. 13, 1907	117	95	73	57	48	43	38	43	34	30	54	49	70
Advance	.....	.....	3	6	7	1	.....	.....	.....	.....	.....	.....	.....

The effect of the advance was to equalize the sum of the locals with the through rates from New Orleans to Montgomery, Selma, and Prattville, but the through rates from New Orleans to Montgomery, Selma, and Prattville were not changed, nor were the local rates from Mobile and Pensacola to Montgomery, Selma, and Prattville disturbed.

Prior to August 13, 1907, shippers, in order to get the benefit of the lower combination, sometimes shipped locally to Mobile and then reshipped to Montgomery, Selma, and Prattville.

The defendant concedes that one of the objects of the advance was to keep the locals from being used to cut the through rate, and the evidence corroborates this position, and it is obvious that this was the underlying reason for the advance.

Transportation between New Orleans, Mobile, and Pensacola was conducted wholly by water carriers until about 1871, when carriage by rail was inaugurated, and shortly thereafter the defendant acquired the railroad which had been built from New Orleans to Mobile and Pensacola, and has operated the same continuously to the present time as a part of its system.

The earliest rail class rates applying via this route, as shown by this record, were established in 1887, and they remained substantially unchanged until the said advance of August 13, 1907. Comparison of water rates issued by the Mobile & Gulf Steamship Co., effective in 1907, and the rail rates prior to the said advance, from New Orleans to Mobile, is shown as follows:

	Class.												
	1	2	3	4	5	6	A	B	C	D	E	H	F
Rail rates	50	37	25	18	15	15	12	15	12½	10	15	18	25
Water rates	44	33	31	27	23	12	10	12	13	8	16	14	10

In the competition between the rail and water lines the tariffs show the rail rates ranged generally higher than the water rates, except in the third, fourth, and fifth classes, under which classes the bulk of the freight carried between these two cities would move. There was some testimony to the effect that formerly the rail rates were not maintained as published when competition was severe with the water lines, neither is it certain that the rates announced by the water lines were maintained. At all events, water transportation gradually declined, and at the date of the hearing carriage by water was very infrequent and cut but little figure as a competitor with the defendant. Some of the reasons for the decline and practical disappearance of water transportation, as disclosed by the testimony in this case, in addition to the results of the competition with defendant, are the slower service of the water lines, the labor troubles in connection with loading and unloading the vessels, inconvenient loading and unloading places for shippers as compared with centrally located freight stations and branch railroads to warehouses, and the want of proper docking facilities.

The advances shown from New Orleans to Mobile of 2 cents on the second class, 13 on the third, 13 on the fourth, 12 on the fifth, 1 on the sixth, and 5 on class E were severely felt by certain shippers in New Orleans shipping to Mobile and adjacent territory, and especially those engaged in jobbing canned goods, lard, flour, coffee, oil, crackers, pickles, vinegar, beans, etc. New Orleans is an important distributing market for canned beans, handling, perhaps, from 400 to 500 carloads per year, and the increase in the rate on this article is extremely burdensome, if not practically prohibitory of shipping into New Orleans and out to Mobile.

The rate on paper was advanced from 18 to 31 cents, and that on stovepipe, tinware, tubs, and galvanized iron tubes from 18 to 31 cents, and it was shown that the manufacturers would have to absorb this advance. It was also shown that the advance of the rates on furniture, iron beds, etc., practically closed out the business with Mobile, as better rates were made from other manufacturing points, such as Atlanta, High Point, and Winston-Salem, N. C.

The rates on bags, burlaps, gunny, and jute were advanced L. C. L., from 15 to 27 cents, and this was vigorously opposed. Strong protest on account of alleged discrimination against New Orleans was made with reference to cotton goods, it being asserted that other manufacturing points are given more favorable rates. Some of the rates upon cotton goods are as follows:

New Orleans to Montgomery, 321 miles, 55 cents; Montgomery to New Orleans, 38 cents; New Orleans to Mobile, 141 miles, 31 cents; Mobile to New Orleans, 18 cents; from Virginia and North and South Carolina points to Montgomery the rate is 43 and 46 cents; Augusta to Montgomery, 346 miles, 35 cents; Augusta to Mobile, 536 miles, 40 cents; New York to Montgomery, 69 cents; Boston to Montgomery, 69 cents; New York to Mobile, via water, 40 cents; Boston to Mobile, via water, 40 cents; New York to New Orleans, via water, 40 cents; New Orleans to New York, via water, 30 cents.

In many other instances on both class and commodity rates the advances caused serious interference with business and have produced loud protests on the part of the merchants shipping from New Orleans to Mobile and points basing thereon.

The advance of the rates from New Orleans to Pensacola was as follows:

Three cents in the third class, 6 cents in the fourth, 7 cents in the fifth, and 1 cent in the sixth class. This advance was not as heavy or as injurious to the merchants in New Orleans in their trade with Pensacola as the advance to Mobile, but they strongly protested against it, and it was shown that, proportionately, like conditions resulted from said advance as were produced by the increase in the rates to Mobile.

The rates from New Orleans to Mobile and Pensacola have been in effect, substantially unchanged, for over 20 years, and there was no evidence that they were not compensatory. They exceed the rates from New Orleans to other water transportation points, e. g., Natchez, Vicksburg, Greenville, and Memphis, where the distances are much greater. They also exceed the rates from Nashville, Memphis, Cincinnati, and Louisville to points where the distances are approximately the same. The rates between New Orleans and Mobile and New Orleans and Pensacola in both directions were identical until this advance occurred, which has disturbed the relation of rates between points where geographical and commercial conditions would seem to demand that they be put on an equality, not only with respect to the trade and commerce with each other, but also with respect to the outbound rates to the southeastern territory. Between other cities, e. g., New Orleans and Memphis, New Orleans and Greenville, New Orleans and Natchez, New Orleans and Vicksburg, the rates are the same in both directions.

With respect to the through rates from New Orleans to Montgomery, Selma, and Prattville, and to the southeastern territory, it was shown that the merchants of New Orleans have heretofore made ineffectual efforts to secure better rates to this territory, as higher rates were in effect from New Orleans to this territory than existed from distributing centers at greater distances west and north of said territory, the situation being such that New Orleans was cut off from the trade of this section as to many products and greatly restricted and burdened as to many others on account of the high rates of transportation.

The manufacturers and shippers of oil, paper, stovepipe, tinware, galvanized tube, furniture, soap, window glass, paints, hardware, and other articles of like kind in daily use testified that they were unable to trade in the Montgomery and Selma territory on account of the high rates, and that upon former occasions they had made special efforts to build up a trade with cities located in this territory and points basing thereon, but in every instance they were compelled to abandon the fight on account of better freight rate concessions from other markets, though at greater distances.

With respect to practically all of the commodities above enumerated, schedules of comparative rates and distances were filed corroborating complainant's contention.

The rates from New Orleans to Montgomery, Selma, and Prattville are higher in all the classes than the rates from other points typical of the situation in the southeast to Montgomery, Selma, and Prattville, where the distances are greater, e. g., Brunswick, Ga.; Savannah, Ga.; Charleston, S. C.; Wilmington, N. C.; and Nashville, Tenn. From New Orleans to certain stations just outside of Montgomery, on the Mobile & Ohio Railroad, the rates are less than the rates to Montgomery, and from some of the Virginia cities to Montgomery and Selma the rates are less than from New Orleans to Montgomery and Selma, though more than twice the distance. The rates from North Atlantic ports to points in southeastern territory basing on Montgomery are more favored when length of haul and the number of lines over which the traffic must be transported are taken into consideration, and the rate in cents per ton per mile on the average of the first six classes is much greater from New Orleans to Montgomery, Selma, and Prattville than they are from Memphis, St. Louis, and Louisville to said points.

The Cooley arbitration of 1886 has been strongly urged by defendant as a reason for the nonreduction of the present advanced rates. This arbitration established a relation of rates as between the several Ohio and Mississippi River crossings, applying upon products from the territory north and west of those rivers destined to southern and southeastern territory, by fixing a basis for making rates from these several basing points to the southeastern territory with the object of maintaining an equitable relation and equality of the basing rate as between said points on goods transported to southeastern territory, but we do not understand that this arbitration undertook to fix the actual rates for carriage from the several basing points to destinations in this territory. However, if such were the case, the building of new railroads, competition, and other causes have forced many departures from the adjustment and the rates made under it, until it has become materially altered, and it is inevitable and proper that it should yield to meet new and changed conditions.

It was stated by the principal witness for the defendant that between points on its line where the through rate exceeded the combination of rates from point of origin to a competitive point and from said competitive point to destination that shippers were given the benefit of the combination rate, and this provision appeared in special circulars and was very generally observed as a rule for the adjustment of freight rates; and such having been formerly the custom of the defendant, it would seem now to work no especial hardship upon it to reduce rates to the basis of the former combination.

Upon full hearing and consideration of all the facts, circumstances, and conditions appearing, it is the opinion of the commission that the advance in these rates upon classes 2, 3, 4, 5, 6, and E, from New Orleans to Mobile, and upon classes 3, 4, 5, and 6, from New Orleans to Pensacola, effective August 13, 1907, was not justified, and that the increased rates resulting therefrom are unjust and unreasonable to the extent that they exceed the former rates in effect immediately prior to August 13, 1907, on the said classes.

The commission is also of the opinion that the through rates heretofore stated, in effect from New Orleans to Montgomery, Selma, and Prattville, on traffic moving through Mobile to said destinations, are unreasonable and unjust as applied to said classes to the extent that said through rates exceed the combination of locals from New Orleans to Mobile and from Mobile to said destinations, immediately prior to August 13, 1907, viz: Class 2, 2 cents; class 3, 13 cents; class 4, 13 cents; class 5, 12 cents; class 6, 1 cent; and class E, 5 cents; also that the through rates from New Orleans to Montgomery, Selma, and Pratt-

ville, on traffic moving through Pensacola and thence to said destinations, are unjust and unreasonable to the extent that they exceed the amounts of the combination of locals from New Orleans to Pensacola and and from Pensacola to said destinations, respectively, which were in effect immediately prior to August 13, 1907, viz: Class 3, 3 cents; class 4, 6 cents; class 5, 7 cents; and class 6, 1 cent.

It is our conclusion, therefore, that the rates on classes 2, 3, 4, 5, 6, and E, from New Orleans to Mobile, should not exceed the following sums: Second class, 37 cents: third class, 25 cents; fourth class, 18 cents; fifth class, 15 cents; sixth class, 15 cents; class E, 15 cents; that the rates on classes 3, 4, 5, and 6, from New Orleans to Pensacola, should not exceed the following amounts: Class 3, 35 cents; class 4, 25 cents; class 5, 20 cents; class 6, 15 cents; that the rates on classes 2, 3, 4, 5, 6, and E, from New Orleans via Mobile to Montgomery and Selma, should not exceed the following amounts: Second class, 77 cents; third class, 55 cents; fourth class, 42 cents; fifth class, 35 cents; sixth class, 35 cents; Class E, 39 cents; and from New Orleans via Mobile to Prattville should not exceed the following amounts: Class 2, 87 cents; class 3, 63 cents; class 4, 50 cents; class 5, 43 cents; class 6, 43 cents; and class E, 44 cents; and that the rate from New Orleans via Pensacola to Montgomery and Selma should not exceed the following amounts: Class 3, 65 cents; class 4, 49 cents; class 5, 40 cents; and class 6, 35 cents; and that the rates from New Orleans via Pensacola to Prattville should not exceed the following amounts: Class 3, 73 cents; class 4, 57 cents; class 5, 48 cents; and class 6, 43 cents.

In regard to the commodity rates attacked in these proceedings certain adjustments and changes have been made therein by the defendant since the institution thereof with the view of correcting inequalities or excessive charges found to exist, which adjustments and changes are admitted to have removed the cause of complaint to some extent. It is impracticable in the present state of the record to determine satisfactorily what other changes, if any, respecting commodity rates should be made. These cases will be retained therefore for such further investigation and consideration of commodity rates involved as the facts and circumstances may seem to require.

An order will be entered in accordance with the foregoing conclusions.

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 26th day of November, A. D. 1909.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

No. 1310.

NEW ORLEANS BOARD OF TRADE (LIMITED)

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

No. 1313.

SAME

v.

SAME.

No. 1328.

SAME

v.

SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission being of the opinion that the advance in these rates upon classes 2, 3, 4, 5, 6, and E, from New Orleans to Mobile, and upon classes 3, 4, 5, and 6 from New Orleans to Pensacola, effective August 13, 1907, was not justified, and that the increased rates resulting therefrom are unjust and unreasonable to the extent that they exceed the former rates, in effect immediately prior to August 13, 1907, on the said classes, and that the through rates in effect from New Orleans to Montgomery, Selma, and Prattville on traffic moving through Mobile to said destinations are unreasonable and unjust as applied to said classes to the extent that said through rates exceed the combination of locals from New Orleans to Mobile and from Mobile to said destinations, immediately prior to August 13, 1907, viz: Class 2, 2 cents; class 3, 13 cents; class 4, 13 cents; class 5, 12 cents; class 6, 1 cent; and class E, 5 cents; and also that the through rates from New Orleans to Montgomery, Selma, and Prattville on traffic moving through Pensacola and thence to said destinations are unjust and unreasonable to the extent that they exceed the amounts of the combination of locals from New Orleans to Pensacola and from Pensacola to said destinations, respectively, which were in effect immediately prior to August 13, 1907, viz: Class 3, 3 cents; class 4, 6 cents; class 5, 7 cents; and class 6, 1 cent; and having made and filed a report containing its findings of fact and conclusions thereon, which said report is made a part hereof.

It is ordered that the Louisville & Nashville Railroad Co., defendant in the above-named cases, be, and it is hereby, notified and required to cease and desist on or before the 1st day of February, 1910, and for a period of not less than two years thereafter, abstain from charging, demanding, collecting, or receiving for the transportation of traffic from New Orleans, La., to Mobile, Ala., rates and charges in excess of the following amounts: Class 2, 37 cents; class 3, 25 cents; class 4, 18 cents; class 5, 15 cents; class 6, 15 cents; class E, 15 cents; and from New Orleans, La., to Pensacola, Fla., rates and charges in excess of the following amounts: Class 3, 35 cents; class 4, 25 cents; class 5, 20 cents; class 6, 15 cents; and from New Orleans, La., via Mobile, to Montgomery and Selma, Ala., rates and charges in excess of the following amounts: Class 2, 77 cents; class 3, 55 cents; class 4, 42 cents; class 5, 35 cents; class 6, 35 cents; and class E, 39 cents; and from New Orleans, La., via Mobile, to Prattville, Ala., rates and charges in excess of the following amounts: Class 2, 87 cents; class 3, 63 cents; class 4, 50 cents; class 5, 43 cents; class 6, 43 cents; and class E, 44 cents; and from New Orleans, La., via Pensacola, to Montgomery and Selma, Ala., rates and charges in excess of the following amounts: Class 3, 65 cents; class 4, 49 cents; class 5, 40 cents; and class 6, 35 cents; and from New Orleans, La., via Pensacola, to Prattville, Ala., rates and charges in excess of the following amounts: Class 3, 73 cents; class 4, 57 cents; class 5, 48 cents; and class 6, 43 cents.

It is further ordered that these cases be retained for such further investigation and consideration of the commodity rates involved herein as the facts and circumstances may seem to require.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled report and order of the commission are true copies of the originals now on file in the office of this commission.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the commission this 31st day of December, 1909.

E. A. MOSELEY, *Secretary.*

COMPLAINANT'S EXHIBIT H.

MOBILE.

Statement showing comparison between the rail class rates from New Orleans, La., to Mobile, Ala., with the rail class rates for similar or less distances charged by other railroads between other principal southern points.

	Distance.	Classes.												
		1	2	3	4	5	6	A	B	C	D	E	H	F
New Orleans, La., to Mobile, Ala....	141	50	39	38	31	27	16	12	15	12½	10	20	18	25
Petersburg, Va., to Raleigh, N. C.....	133	61	51	42	32	28	21	17	22	21	18	28	32	42
Danville, Va., to Charlotte, N. C...	141	68	58	48	38	33	25	18	24	23	20	33	38	46
Cary, N. C., to Monroe, N. C.....	141	58	48	37	29	22	21	16½	19	17	14	24	29	34
Wadesboro, N. C., to Wilmington, N. C.....	135	58	46	36	28	22	21	16	19	16	14	24	28	32
Wilmington, N. C., to Cheraw, S. C...	129	59	54	44	37	30	24	18	22½	20	16	31	37	37
Durham, N. C., to Cameron, N. C....	139	56	46	36	28	22	21	16	19	16	14	24	28	32
Macon, Ga., to Augusta, Ga.....	125	50	45	40	32	25	21	15	21	12	11	23	27	24
Atlanta, Ga., to Chatt'ga, Tenn...	137	57	48	43	34	27	22	20	22	13	12½	27	34	26
Atlanta, Ga., to Hawkinsv'e, Ga..	137	63	56	48	40	33	27	20	23	12	11	31	36	24
Birm'ham, Ala., to York, Ala.....	125	54	46	41	33	26	21	21	21	13	12	26	33	25
Memphis, Tenn., to West Point, Miss.	142	72	58	44	39	32	26	24	27	16	16	23	29	32
Gadsden, Ala., to Tuscaloosa, Ala...	112	63	55	44½	34	32	24½	21	23½	20½	17	30½	33½	34
Montgomery, Ala., to Dothan, Ala...	119	64	55	47	43	36	30	30	23	20	17	30	36	34
Nashville, Tenn., to Humboldt, Tenn.	147	65	56	49	42	31	29	29	30	22	17	25	28	44
Memphis, Tenn., to Paris, Tenn.....	133	50	43	38	32	27	24	22	24	21	15	24	24	42
Jackson, Tenn., to Cairo, Ill.....	107	58	49	42	35	27	27	26	26	18½	15	22	24	37
Raleigh, N. C., to Wilmington, N.C.	133	53	43	32	27	24	18	15	19	18	13	25	28	37
Greenville, Miss., to West Point, Miss.	150	70	56	44	38	32	26	18	27	16	15	23	29	32
West Point, Miss., to Elizabeth, Miss.	138	68	54	44	37	32	28	18	33	28	15	32	44	38
Vicksburg, Miss., to Hattiesburg, Miss.....	134	73	61	48	38	31	25	24	25½	20	16	27	38	36
Meridian, Miss., to Tupelo, Miss.....	144	64	52	40	35	30	27	20	26	24	14	31	34	43
Charleston, S. C., to Georgetown, S. C.	90	47	41	36	33	26	20	18	20	17	15	26	28	32
Birmingham, Ala., to Columbus, Miss	123	66	56	51	46	39	30	26	28	19	19½	31	41	39
Brunswick, Ga., to St. Augustine, Fla.	130	68	58	50	39	31	23	22	22	20	17	38	41	30
Chattanooga, Tenn., to Atlanta, Ga....	138	52	45	41	32	25	20	20	21	12	11	27	31	24
Montgomery, Ala., to Americus, Ga..	141	75	63	56	44	34	29	27	25	14	13	35	41	28

COMPLAINANT'S EXHIBIT I.

PENSACOLA.

Statement showing comparison between the rail class rates from New Orleans, La., to Pensacola, Fla., with the rail class rates for similar or less distances charged by other railroads between other principal southern points.

	Distance.	Classes.												
		1	2	3	4	5	6	A	B	C	D	E	H	F
New Orleans, La., to Pensacola, Fla.	246	55	45	38	31	26	16	18	18	15	13	25	25	30
Lynchburg, Va., to Bristol, Va.....	204	84	79	64	52	43	40	24	34	28	27	45	55	55
Alexandria, Va., to Danville, Va.....	232	58	48	38	27	24	18	18	23	17	15	24	27	34
Norfolk, Va., to Danville, Va.....	207	59	50	41	29	22	18	18	21	19	15	22	29	37
Norfolk, Va., to Aberdeen, N. C...	247	68	58	48	38	33	25	18	24	23	20	33	38	46
Richmond, Va., to Pembroke, N. C..	248	80	70	60	50	40	32	22	28	25	22	41	47	50
Henrietta, N. C., to Raleigh, N. C.....	246	65	55	45	36	32	25	19	24	22	19	32	36	44
Cary, N. C., to Henrietta, N. C.....	237	65	55	45	35	32	25	19	24	21	18	32	36	42
Lincolnton, N. C., to Wilmington, N. C.	219	64	54	45	35	31	24	18	23	20	17	31	35	40
Chattanooga, Tenn., to Bristol, Tenn..	242	71	61	53	39	34	27	23	26	18	18	34	45	36

Statement showing comparison between the rail class rates from New Orleans, La., to Pensacola, Fla., etc.—Continued.

	Distance.	Classes.												
		1	2	3	4	5	6	A	B	C	D	E	H	F
Savannah, Ga., to Wilmington, N.C.	266	65	53	48	34	28	20	20	20	19	18	30	26	29
Nashville, Tenn., to Knoxville, Tenn..	216	70	60	54	44	37	27	18	24	21	17	32	37	24
Columbus, Ga., to Hawkinsville, Ga.	207	67	59	52	43	33	27	24	23	12	11	31	36	24
Columbus, Ga., to Helena, Ga.....	234	78	65	58	45	36	30	30	26	14	13	36	45	29
Savannah, Ga., to Bainbridge, Ga...	237	66	59	51	43	35	29	20	25	15	14	35	43	33
Savannah, Ga., to Wilmington, N.C.	266	65	53	48	34	28	20	20	20	19	18	30	26	29
Knoxville, Tenn., to Birmingham, Ala	254	63	54	45	36	30	22	20	23	17	13	29	21	26
Chattanooga, Tenn., to Bristol, Tenn...	242	71	61	53	39	34	27	23	26	18	18	34	45	36
Mobile, Ala., to York, Ala.....	213	79	69	58	45	42	31	20	23	18	15	39	22	44
Birmingham, Ala., to Ozark, Ala.....	187	91	80	71	56	46	39	33	34	24	20	46	48	41
Birmingham, Ala., to Dothan, Ala...	215	94	81	77	61	52	42	33	34	24	20	52½	51	31
Nashville, Tenn., to Cartersville, Ga.	241	66	59	54	43	35	29	20	25	19	15	33	35	30
Memphis, Tenn., to Birmingham, Ala.	251	75	65	54	43	36	26	24	27	20	16	35	35	32
Memphis, Tenn., to Huntsville, Ala...	213	54	50	39	31	25	20	17	22	19	15	25	31	30
Covington, Ky., to Middlesboro, Ky .	228	66	57	50	45	40	37	37	34	23	18	37	37	46
Frankfort, Ky., to Clarksville, Tenn .	242	53	48	39	31	25	25	25	23	18	17½	20	28	34
Louisville, Ky., to Humboldt, Tenn.	229	78	67	57	46	33	29	27	31	24	18	26	34	48
Newport. Ky., to Central City, Ky .	235	78	67	58	52	46	43	43	43	27	21	43	43	54
Nashville, Tenn., to Birmingham, Ala.	207	63	54	45	36	30	22	20	23	17	13	29	25	26
Meridian, Miss., to Greenville, Miss ..	223	89	73	63	53	44	39	28	32	30	23	27	50	40
Union City, Tenn., to Columbus, Miss.....	242	80	68	58	49	42	36	38	40	30	24	39	54	60
Jackson, Tenn., to Meridian, Miss ...	251	81	68	59	49	42	37	39	41	30	25	39	54	60
Union City, Tenn., to Aberdeen, Miss.	215	78	66	57	48	41	35	37	39	29½	24	37	52	59
Cairo, Ill., to New Albany, Miss.....	249	68	57	46	41	34	29	26	27	19½	19	30	38	39
Wilmington, N. C., to Wadesboro, N. C.....	175	56	46	36	28	22	21	16	19	16	14	24	28	32
Mobile, Ala., to West Point, Miss.	233	73	58	47	39	33	29	30	32	26	22	36	41	49
Mobile, Ala., to Aberdeen, Miss...	250	73	58	47	39	33	29	30	32	26	22	36	41	49
Mobile, Ala., to Jackson, Miss.....	226	81	70	58	49	41	36	31	27½	22	20	30	51	40
Cheraw, S. C., to Wilmington, N. C.	150	59	54	44	37	30	24	18	22½	20	16	31	37	37
Wilmington, N. C., to Henderson, N. C.....	251	61	51	42	32	28	21	17	22	21	17	28	32	42

Mr. WORTHINGTON. I wish formally to offer in evidence the map showing the location of the Oxford and Packer dumps. It was identified by Mr. James Archbald when he was on the stand and a large edition of it is on the wall and has been referred to by several witnesses, but it is not in the record. It is marked "United States Senate Exhibit M."

The PRESIDENT pro tempore. Is there objection? If not, it will be received.

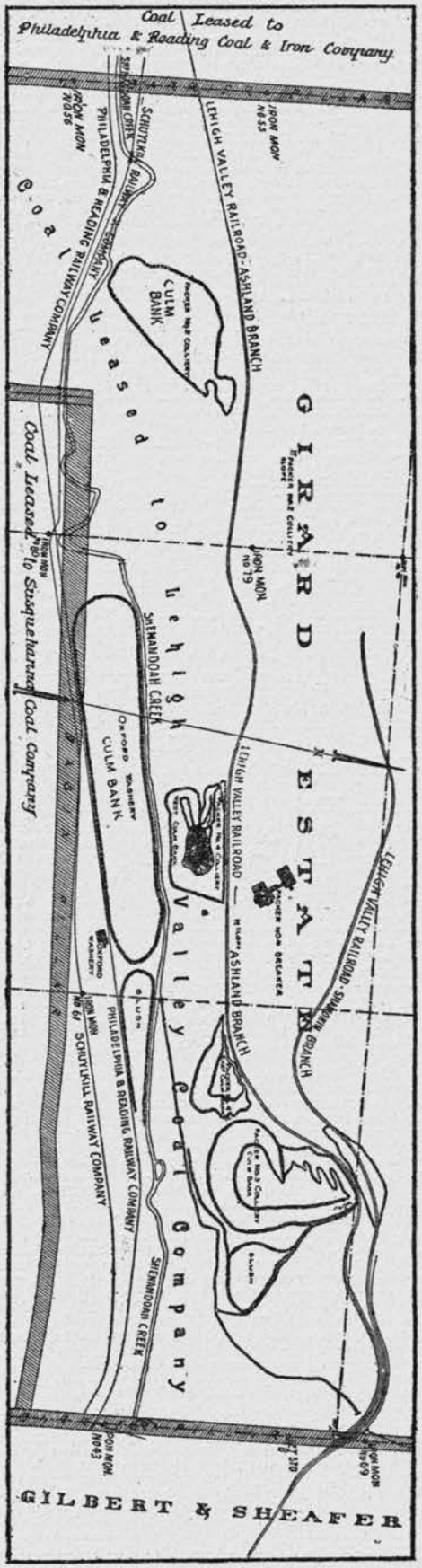
[The accompanying diagram is the map referred to.]

Mr. WORTHINGTON. I wish, finally, to offer in evidence the plan of the Federal building in Scranton, which was identified by the Supervising Architect of the Treasury and marked as an exhibit at the time but was not offered in evidence.

Mr. Manager STERLING. I should like to ask the purpose of that testimony.

Mr. WORTHINGTON. The purpose of it is to have it in connection with the testimony of one or two witnesses. The map was shown to one of the witnesses; I have forgotten who the witness was; it was identified by Mr. Wenderoth, and afterwards referred to by one of the other witnesses. The purpose of it is to show that W. P. Boland could not from his office have seen the interior of Judge Archbald's office. He testified that he could see everybody coming in and going out of there, and saw Mr. Williams in there a good deal. The testimony in connection with the map, we think, shows that to be impossible.

The PRESIDENT pro tempore. The Chair thinks it is admissible, if it has been sufficiently proven.



Mr. Manager STERLING. We do not object.

[For the plan referred to see page 1167.]

Mr. WORTHINGTON. We rest here, Mr. President.

The PRESIDENT pro tempore. Is there anything in rebuttal?

Mr. Manager STERLING. We will call Mr. Horgan.

TESTIMONY OF JOHN HORGAN, JR.

John Horgan, jr., being duly sworn, was examined and testified as follows:

Q. (By Mr. Manager STERLING.) Where do you live?—A. Scranton, Pa.

Q. What is your business?—A. Photographer.

Q. Did you recently take a picture of the Federal building in Scranton?—A. I did.

Q. Look at this exhibit, U. S. S. No. 101, and state if that is the picture you took?—A. (After examination.) It is.

Q. Where were you located when you took that picture?—A. In W. P. Boland's office in the Republican Building.

Q. And the picture is a picture of what building?—A. The Federal post office in Scranton.

Q. Mr. Boland occupied the same office when you took that picture that he has occupied for some years?—A. To my knowledge, yes.

Q. Looking at the picture, you see a man standing in the window in the Federal building, with a paper in his hand?—A. Yes, sir.

Q. In whose office is that man?—A. I do not know.

Mr. Manager STERLING. I think the gentlemen will agree that it is Judge Archbald's office. [Continuing after consultation with counsel.] Mr. President, it is stipulated that the man standing in the window in the Federal building with a paper in his hand, as shown in the photograph, is in the window of one of the rooms of the offices occupied by Judge Archbald, known as——

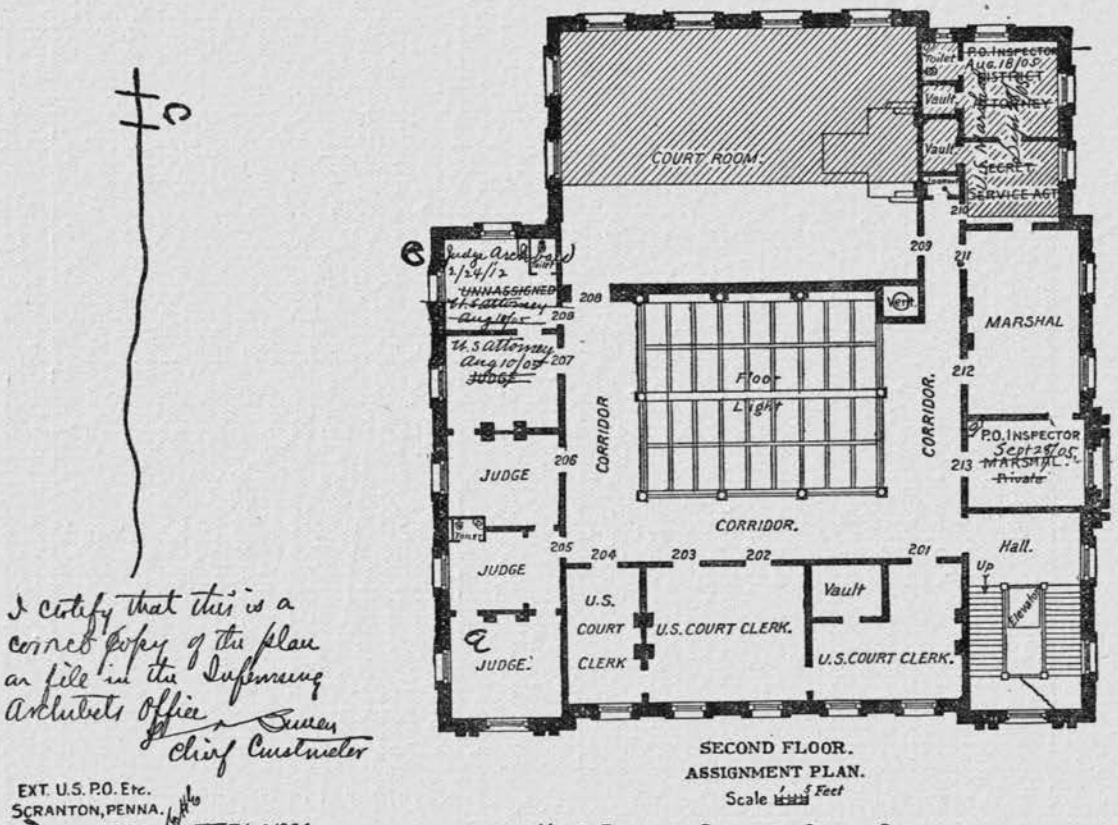
Mr. WORTHINGTON. That is not just what we stated. What we stated is that that is the outer room——

Mr. Manager STERLING. It is known as the outer room of his suite of offices.

Mr. WORTHINGTON. One goes through it to get into the room where Judge Archbald habitually stayed.

Mr. Manager STERLING. That is where the witness said he saw Williams.

The PRESIDENT pro tempore. Does the manager offer that picture in evidence?



Mr. Manager STERLING. Yes, sir.

The PRESIDENT pro tempore. Without objection, it will be admitted.

Mr. Manager STERLING. We do not consider it very material, but it rebuts the evidence that has just been offered on the other side.

[See page 1168 for photograph.]

Mr. Manager STERLING. That is all. Take the witness.

Mr. WORTHINGTON. There are no questions.

The PRESIDENT pro tempore. The witness may retire.

CHRISTOPHER G. BOLAND—RECALLED.

Christopher G. Boland, having been previously sworn, was further examined and testified as follows:

Q. (By Mr. Manager STERLING.) Mr. Boland, when you went to Judge Archbald's office and found George M. Watson there with Archbald, I will ask you if Judge Archbald stated to you this, in substance: As I understand it, you employed Mr. Watson to settle these matters for you with the Delaware, Lackawanna & Western Railroad Co. for $100,000, and you were to pay him a fee of $5,000 in case he made the settlement.

Mr. WORTHINGTON. Mr. President, I certainly object to that. This witness was here and the managers in their case in chief went fully into that conversation. It would be a great misadventure, it seems to me, to have him brought back now to go over the matter again. It was stated that he was summoned to that office by telephone; that he went over there and found Judge Archbald and Mr. Watson, and he went on to state what took place, and especially what took place in reference to the very matter now being asked about.

The PRESIDENT pro tempore. The present witness?

Mr. WORTHINGTON. The present witness.

Mr. Manager STERLING. I submit that he did not testify as to the fact that is called for in this question, and I think it is perfectly competent in two views of the case. If we should say to the court that the matter was overlooked at the time, or if we should say to the court, which is the fact, that we have laid the foundation, when Judge Archbald was on the stand, to contradict him, because I asked him the exact question. It is perfectly competent in every view of the case.

The PRESIDENT pro tempore. The Chair will hear from counsel for the respondent.

Mr. WORTHINGTON. After testifying that he had been called to Judge Archbald's office and telling about the conversation with Watson the witness said:

After talking with Mr. Watson he agreed to accept $5,000 for his fee, giving us $95,000 in the event of his selling the property. I remember a day or two after that, I think the day after that, being called over to Judge Archbald's office.

Q. Proceed.—A. Where I met Mr. Watson and Judge Archbald. After some discussion of the matter there, the judge informed me that he was going to assist Mr. Watson in an effort to dispose of the property and to release us from the difficulty in which we were involved at the time, referring particularly to this Peale case which was in his court—I think he was judge at that time—saying he would give it a good deal of consideration, and saying it was a good case to settle out of court.

Then, a little further down, on page 396, he was asked to state all that occurred. I am reminded that Judge Archbald denied that he ever had any conversation with Watson and this witness in his office—that they had ever been there together—so there can not be any foundation laid for anything he is said to have said at the conversation.

Mr. Manager STERLING. He said he did not remember any.

Mr. WORTHINGTON. This witness went on:

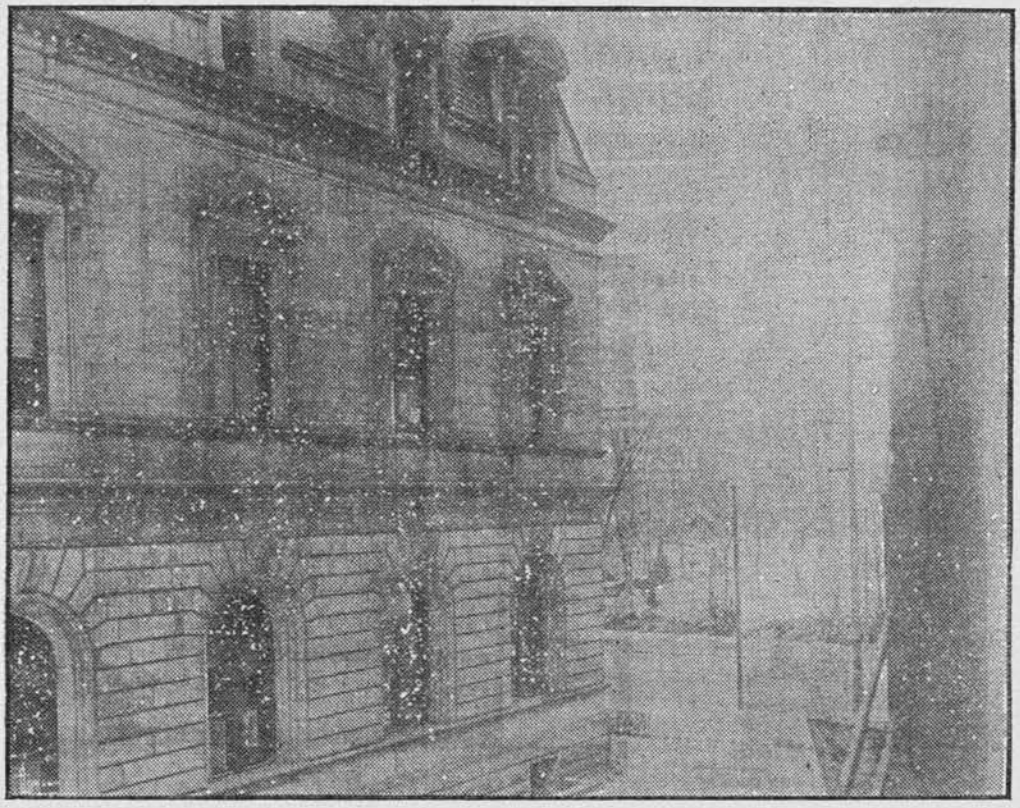
A. My recollection is that Mr. Watson recited the fact that he had spoken to the judge about the matter and that the judge had agreed to assist him. The judge stated to me that he would do what he could in the matter. But during the course of the talk a suggestion was made to me that there ought to be some paper furnished to Mr. Watson guaranteeing him, in the event of his disposing of the two-thirds interest or stock, that he would be paid this $5,000.

Q. Who made that suggestion to you?—A. I am not quite positive on that, but we all joined in the discussion—Judge Archbald, Mr. Watson, and myself. I informed both of them that, as my brother controlled a majority interest of the stock to be disposed of, I had consulted him and he had agreed that this payment should be made, but if they thought a paper ought to be made reciting the agreement I would endeavor to obtain it, and it was agreed that I should do so.

Further on in the volume, on page 397——

Mr. Manager STERLING. I do not see the purpose in reading this testimony.

Mr. WORTHINGTON. The purpose is to show that this witness was called on to state everything that occurred, and it is not competent to have him come back now to piece up what he then said.



Mr. Manager STERLING. There is nothing in the evidence of that kind. May I make my objection to what the counsel is reading? I am insisting that it is not proper for counsel to read the testimony of this witness. Even if we conceive that he was asked everything, and he said he had stated everything, we would have a perfect right to refresh the witness's recollection and ask what was said on a certain subject. That is the rule.

Mr. WORTHINGTON. It is a rule that is unknown to counsel for the respondent. They never heard of it before. It has been the rule that when you put a witness on the stand and go through a certain matter, you can not make him come back and go over that matter again unless something was brought out in the trial which substantially called for a denial.

Mr. Manager STERLING. That is just the point.

Mr. WORTHINGTON. Judge Archbald said that no such conversation was held.

The PRESIDENT pro tempore. If there is any fact that enters into the testimony that was not developed on the former examination, the Chair thinks this investigation would justify its being brought to the attention of the Senate, even if it were not technically according to the ordinary practice. If it is simply a repetition, the Chair would hold it was not proper to further encumber the record. But if there is any fact within the knowledge of this witness that was not elicited on the former examination, the Chair would hold that the Senate is entitled to have it. The Chair will ask that the managers do not unnecessarily indulge in repetition of what has already been testified to.

Mr. Manager STERLING. We shall not go any further upon this particular question. Let the question be read by the reporter.

The Reporter read as follows:

Mr. Boland, when you went to Judge Archbald's office and found George M. Watson there with Archbald, I will ask you if Judge Archbald stated to you this in substance——

Mr. WORTHINGTON. I submit that the manager can only ask the witness if he recollects anything that he had not done before. He certainly has no right to bring him back and ask him the same question.

The PRESIDENT pro tempore. The Chair thinks that it is a leading question.

Mr. Manager STERLING. I will state that I put it in that form because I understand that is the form in which it must be put for the purpose of contradiction. As I said before, I have a perfect right to offer it as original testimony. I will put it in this form. [To the witness:] Mr. Boland, I will ask you if in that conversation which was had at the time referred to in the former question you remember of anything being said there about consideration?

Mr. WORTHINGTON. I object. That is just what the manager can not do. I submit the witness ought to be asked if he

recalls anything about that conversation that he did not tell us about when on the stand before.

Mr. Manager STERLING. I will do anything to accommodate the gentleman. [To the witness:] I will ask you, Mr. Boland, if there was anything in that conversation that you did not testify to the other day which you now recall?

The WITNESS. From your inquiry and hearing the judge testify that he had no recollection of my meeting with himself and George Watson at his office, I recall that the conversation or suggestion as to the amount to be paid to us and the fee to George Watson was substantially as you have embodied it in the question.

Q. (By Mr. Manager STERLING.) Just state what Judge Archbald said with reference to the amount of the proposition on which Watson was to settle. Give the substance of what the judge said about it.—A. In substance, it was reciting what Mr. Watson had told him, that he had been engaged by myself, on behalf of a majority of the stockholders of the Marian Coal Co., to dispose of their interest for $100,000, maximum, and that Mr. Watson was to receive a fee of $5,000, if he succeeded in making the sale, for disposing of our interest.

Mr. Manager STERLING. That is all.

Mr. JONES. Mr. President, I desire to submit a question.

The PRESIDENT pro tempore. The Senator from Washington propounds a question to the witness, which will be read by the Secretary.

The Secretary read as follows:

Have you talked this over with any of the managers before coming to the stand to-day?

The WITNESS. Yes, sir.

Cross-examination:

Mr. WORTHINGTON. I was about to ask Mr. Boland whether at that time——

The WITNESS. May I explain, if you please, Mr. President?

The PRESIDENT pro tempore. The witness has a right to explain his answer if he desires to do so.

The WITNESS. Before the court convened this afternoon Mr. Manager STERLING asked me as to my recollection of the matter to which I have just testified, and I told him that his question to me was substantially correct as it is now in the record.

Q. (By Mr. WORTHINGTON.) Why did you not tell about that when you were on the stand before?—A. I can not answer that exactly. I supposed I had covered the whole matter fully, or else I had overlooked the matter. I said I had met Mr. Watson and Judge Archbald in Judge Archbald's office.

Q. We know what you said. I will ask you whether when on the stand before this question was not asked you, on page 397, after you had told about what had occurred at that interview:

Q. Now I will ask you to state whether or not anything else was done or said by Judge Archbald at this interview which you have described, when Mr. Watson and yourself were present in Judge Archbald's office?

Do you remember that that question was asked?—A. If it is in the record it must have been asked.

Q. And your answer is—

A. I do not remember that. I do not know whether it was at that or a subsequent call at Judge Archbald's office the judge called on the telephone to the Scranton office of Mr. E. E. Loomis, who was the vice president of the Delaware, Lackawanna & Western Railroad Co., to arrange an interview with him in reference to this matter.

I understand that at that time, if I recollect your testimony, it was stated either by Judge Archbald or by Mr. Watson, as you say, that the contract by which Mr. Watson was to be employed should be put in writing.—A. My understanding was that that was the purpose of my being called into Judge Archbald's office.

Q. In compliance with what took place at that office, you then went and got a letter from your brother William P. Boland.—A. That is substantially correct.

Q. I will call your attention to the language of that letter, which is on page 397 of the record, the same page I was reading from before. I will read it to you:

SCRANTON, PA., *August 23, 1911.*

C. G. BOLAND, Esq., *Scranton, Pa.*

DEAR SIR—

This being a letter from W. P. Boland, president of the Marian Coal Co., to you—

In reference to the matter of G. M. Watson being taken into the case of the Marian Coal Co. against the D. L. & W. would say, in confirmation of what I told you heretofore, that if through the efforts of Mr. Watson a satisfactory settlement is brought about the Marian Coal Co. agrees to pay him $5,000 for such settlement.

Now, if the contract that was arranged then was that you were to deliver it for $100,000 why did you not put it in the letter?—A. I did not draw that paper or acknowledgment.

Q. You went to W. P. Boland and told him what was demanded, did you not?—A. I did; and he then dictated to his stenographer, I think, that statement which he believed was sufficient to satisfy Mr. Watson that he would be paid $5,000 in the event of his disposing of the property. I presented it to Mr. Watson and he accepted it.

Q. I know about that.—A. I have already testified to that.

Q. I want to know if at that talk at Judge Archbald's office the arrangement was that Mr. Watson was to settle for the maximum sum of $100,000 and get $5,000 fee, if he did it, why it was put in here simply as a satisfactory settlement without saying anything about the amount.

Mr. Manager STERLING. I object. The witness has said that he did not prepare it.

Q. (By Mr. WORTHINGTON.) You went to your brother and told him what was demanded at that meeting?—A. I did.

Q. And what Watson required?—A. I did.

Q. And your brother, pursuant to what Williams told you, wrote this letter?—A. Yes, sir.

Q. And you gave it to Watson in compliance with Watson's demand?—A. Watson accepted it as satisfactory.

Q. That letter was dictated in your presence?—A. I believe so.

Q. And you were vice president of this company yourself?—A. I held no office in it at the time.

Q. You were director at that time in the Marian Coal Co.?—A. No; I held no office in the company. Some time in May, 1910, just before I went on a trip abroad, I resigned. I was president of the company previous to that, and a director, of course, but I resigned both the presidency and my position as director, being only a stockholder in the company.

Q. You were examined as a witness in this case by the Judiciary Committee?—A. Yes, sir.

Q. Did you have a talk with some of the managers before you went on the stand there as to your knowledge about these circumstances?—A. I do not remember having talked with anyone but Mr. Wrisley Brown in reference to it. He came to see me at Scranton and I made a statement. This I have already testified to.

Q. Mr. Wrisley Brown was sitting with the members of the Judiciary Committee in that inquiry, just as he is sitting here with the managers now, was he not?—A. Yes, sir.

Q. He had taken your statement?—A. Yes, sir.

Q. Did you not talk with the managers or somebody representing the managers before you were put on the stand at this trial in the Senate?—A. I have just stated that Mr. STERLING talked with me this afternoon.

Q. I am speaking about before you went on the stand in the first place in this trial, when you came down here to Washington?—A. Except in a general way; I was at their office in the House Office Building and met them, but there was no discussion as to my testimony or what I was to testify, that I can recall.

Q. Did you tell Mr. Wrisley Brown when he talked to you before you appeared before the Judiciary Committee that at this interview at Judge Archbald's office the sum of $100,000 had been mentioned as the maximum, and that Mr. Watson was to settle it?—A. I do not recall now whether I did or not.

Q. Did you ever tell anybody connected with this case?—A. Oh, yes.

Q. Before you were put on the stand at the present time?—A. Yes, sir.

Q. To whom did you tell anybody connected with this case?—A. Anyone connected with this case?

Q. Yes.—A. I testified to it already, I think, in the Senate proceedings, that I had agreed with Mr. Watson that he should obtain $5,000 in the event of his selling the property for $100,000.

Q. That is not what I am talking about. I am asking you whether you told anybody before you told it to Mr. Manager STERLING to-day or yesterday, whenever it was, that in Judge Archbald's office when he was present that was mentioned?—A. Did I tell it to anybody?

Q. Connected with this case? If you told it to Mr. Manager STERLING, when did you talk to Mr. Manager STERLING about it?—A. Just previous to the session opening this afternoon. He came into the Sergeant at Arms's office——

Q. Before that, at any time or place did you ever tell it to anybody connected with this case?—A. I certainly testified to it before the Judiciary Committee, and I am not sure but I testified to it here substantially—that is, my agreement with Watson—and it was clearly understood on this occasion when Watson and the judge and myself were together.

Q. I do not want you to go back again. I am asking you what you have testified to heretofore or with whom you have talked about this matter. You say you think you testified to it before the Judiciary Committee. Do you say that you testified

before the Judiciary Committee that in Judge Archbald's presence in his office it was mentioned that Watson was to settle for a maximum of $100,000?—A. I do not recall that.

Q. No. Do you think you so testified when you were on the stand in this trial the other day?—A. I do not know; but I know that that is the fact.

Q. But you do not know that you ever mentioned that fact to anybody until you mentioned it to Mr. Manager STERLING to-day?—A. I am positive that I did, but I can not recall now, at this moment, to whom I mentioned it.

Re-direct examination:

Q. (By Mr. Manager STERLING.) Just one question, Mr. Boland: You just told your brother William P. Boland that you had been——

Mr. WORTHINGTON. I object to that leading style of question, Mr. President.

Mr. Manager STERLING. This is cross-examination of what the other side drew out.

Mr. WORTHINGTON. Cross-examination!

Mr. Manager STERLING. Yes.

Mr. WORTHINGTON. I am learning a great deal, Mr. President, about cross-examination, if this is cross-examination. The witness has been called by the managers.

Mr. Manager CLAYTON. There is a good deal for you to learn, perhaps.

The PRESIDENT pro tempore. The Chair thinks the manager can ask the witness what he said.

Q. (By Mr. Manager STERLING.) You did go to your brother and tell him what Judge Archbald and Watson had said about the fees, did you?—A. I did.

Q. And that they wanted it in writing?—A. Yes, sir.

Q. They did not demand that anything be put in writing about the price they were to settle for, did they?—A. No; and I can recall now that Mr. Watson was not bound strictly to obtain $100,000 for us. He was told very distinctly that we would be willing to talk about a lesser amount.

Q. And did they tell you, either of them, that you should put in the writing relating to the attorneys' fees that the settlement should be for $100,000?—A. No; all that I was required to do was to obtain from my brother, who was president of the company and held, either personally or by option, two-thirds of the stock of the Marian Coal Co., an acknowledgment for Mr. Watson guaranteeing him a $5,000 fee in the event of his succeeding in selling the property.

Q. That is all they demanded, then, and all you asked your brother to give them?—A. When I say "the sale of the property" I mean the stock of the company held by the majority of the stockholders.

Q. And the very fact that you had said to Mr. Watson that you would take less——

Mr. WORTHINGTON. Now, Mr. President, I certainly do object. The manager is not only leading, but is putting arguments in the mouth of the witness.

Mr. Manager STERLING. It is nothing but cross-examination about what you have brought out.

Mr. SIMPSON. Cross-examination of your own witness?

Mr. Manager STERLING. Certainly. Our own witness on a matter you brought out.

Mr. SIMPSON. I never heard that you could cross-examine your own witness until to-day. I object, sir.

Mr. Manager STERLING. If you have never heard of it before, you have heard of it now. On any new matter that is brought out on cross-examination the party calling the witness may cross-examine. We never asked the witness about this writing, and we have got a perfect right to cross-examine him.

The PRESIDENT pro tempore. The manager can examine without asking leading questions, the Chair is sure.

Mr. Manager STERLING. It is pretty hard to ask this question without leading.

The PRESIDENT pro tempore. Of course, the subject matter about which information is desired must necessarily be suggested.

Q. (By Mr. Manager STERLING.) Inasmuch as you had authorized Mr. Watson or said to Mr. Watson that you would take less than $100,000, do you think that it would have been proper to have put in this agreement the limitation of $100,000?

Mr. WORTHINGTON. I object to that, Mr. President. It is calling for an opinion of this witness on a matter on which he is not an expert.

The PRESIDENT pro tempore. The Chair thinks that the manager can ask what, in his opinion, was required to be put in the agreement in pursuance of the conference which he had already had. That is legitimate.

Mr. Manager STERLING. I will not press it further.

Q. (By Mr. Manager STERLING.) Mr. Boland, in your testimony before the Committee on the Judiciary, I will ask you if Mr. LITTLETON asked you these questions, which are found on page 992:

Mr. LITTLETON. I said Mr. Watson recited to you and to Judge Archbald, or in your presence, what had been agreed to?
Mr. BOLAND. At the judge's office?
Mr. LITTLETON. Yes.
Mr. BOLAND. Yes, sir.
Mr. LITTLETON. And you say the judge "assented"; that was the word you used. Just what was it to which the judge assented?
Mr. BOLAND. The judge assented to assisting Mr. Watson.
Mr. LITTLETON. In the sale of the property?
Mr. BOLAND. In the sale of the property.
Mr. LITTLETON. The price was named at that time?
Mr. BOLAND. The price was named; yes, sir
Mr. LITTLETON. At $100,000?
Mr. BOLAND. Yes, sir.

Were those questions asked you and did you make those answers before the Judiciary Committee?—A. Yes, sir.

Mr. Manager STERLING. I will say, Mr. President, that I thought until last night that that testimony was in the examination of Mr. Boland before the Senate. When I ascertained that it was not, I talked with Mr. Boland this morning, and inquired about it, and he told me just what he has testified here to-day. The testimony of Mr. Boland before the Judiciary Committee, from which I read, is found on page 992 of the evidence taken before the committee.

Recross-examination:

Q. (By Mr. WORTHINGTON.) Now, Mr. Boland, I will ask you whether you testified to this before the Judiciary Committee, reading from the middle of page 993:

Mr. BOLAND. The matter is quite well fixed on my memory that the judge informed me that he was to assist Mr. Watson in the disposal of our interest; but as to any details, how it should be done, or anything further than that, I do not think it was discussed, outside of the judge's suggestion about a case then pending, the Peale case.
Mr. LITTLETON. Just before we get to that, did you know at that time that there was any price in contemplation for the sale of this property beyond $100,000?
Mr. BOLAND. Not at that time; no, sir.
Mr. LITTLETON. Was anything said about fixing a larger or higher price than $100,000 in that conference?
Mr. BOLAND. I do not think it was said at that time.
Mr. LITTLETON. Was Watson's $5,000 to come out of the $100,000?
Mr. BOLAND. Yes, sir.

A. That is correct; I so testified.

The PRESIDENT pro tempore. Are there any further questions for the witness?

Mr. Manager STERLING. That is all.

Mr. WORTHINGTON. I have nothing more to ask.

The PRESIDENT pro tempore. The witness may retire. Is it desired that the witness shall be retained any further?

Mr. Manager WEBB. No, sir; the witness may be excused.

The PRESIDENT pro tempore. The witness is finally discharged.

Mr. Manager CLAYTON. Mr. President, the managers rest here.

Mr. WORTHINGTON. Judge Archbald, will you take the stand?

TESTIMONY OF ROBERT W. ARCHBALD—RECALLED.

Q. (By Mr. WORTHINGTON.) Judge Archbald, you have heard Mr. C. G. Boland just testify about a statement in your office that Watson was to settle for a maximum price of $100,000. Will you tell us what you have to say about that?

Mr. Manager STERLING. We object to pursuing this any further. Both of these witnesses have testified on that.

The PRESIDENT pro tempore. The Chair certainly thinks that counsel have a right to ask the question of the witness. The witness will proceed to answer it.

Mr. WORTHINGTON (to the witness). What have you to say about that?

The WITNESS. May I hear the question again?

Q. (By Mr. WORTHINGTON.) You have just heard the witness, C. G. Boland, state that at your office, when Mr. Watson and he and yourself were present, it was stated that Watson was to get $5,000 for effecting a settlement of these matters for $100,000 or less—not to exceed $100,000. Will you tell us whether anything of that kind took place?—A. Not that I remember.

Q. Will you tell us whether at any time or at any place you were informed that there was a limitation of $100,000 on the price that he was to settle for?—A. On the contrary, I understood that the claim of the Bolands which Mr. Watson was to present was for one hundred and sixty-odd thousand dollars.

Mr. Manager STERLING. I object. We have been over all that.

Mr. WORTHINGTON (to the witness). You can answer the question whether at any time or at any place you were told that there was a maximum limit of $100,000 that was put upon

Watson as to the amount he was to demand in settlement of the claims of the Marian Coal Co.—A. Never.

Q. Now, in reference to the photograph, which has just been put in evidence, of the Federal building, there is in one of the windows of the building a man standing holding a piece of paper. Have you seen that?—A. (After examining.) Yes; I see that.

Q. Will you tell what you have to say as to that room?—A. That is not my office; that is an outer office occupied by my messenger or crier. My office is the one in the extreme corner.

Q. To the right or left of the one in which the man is standing in the photograph?—A. To the right in this picture.

Q. During what period was it that your office was where you have just mentioned?—A. My office was where I have mentioned from the time I moved into the Federal building, along some time in the spring of—well, soon after I was appointed. There were changes made that——

Q. Soon after you were appointed to what office?—A. To the district court.

Q. That was in 1901?—A. That was along in 1901; but I did not go in there immediately; then from that time until the office was changed to the rear of the building, and that office was occupied by Judge Witmer. That occurred along about February or March of 1912.

Q. So that from February or March of last year your office has been directly opposite Mr. Boland's office?—A. Yes; since along in March or April. The office I am occupying at present in Scranton is directly opposite the office occupied by Mr. Boland in the Republican Building.

Mr. WORTHINGTON. That is all.

Recross-examination:

Q. (By Mr. Manager STERLING.) Judge, one entering your office must go through this room, as I understand, to get to your office?—A. Yes; people to enter the office that I occupy go through that room.

Q. But it belongs to the same suite that your office does?—A. Yes.

Mr. Manager STERLING. That is all.

Mr. WORTHINGTON. That is all. We rest again.

The PRESIDENT pro tempore. Is there anything further on the part of the managers?

Mr. Manager CLAYTON. Mr. President, that concludes the case for the managers.

The PRESIDENT pro tempore. The evidence is therefore concluded.

Mr. Manager CLAYTON. Now, Mr. President, I should like to have the Chair announce that the witnesses may be discharged.

The PRESIDENT pro tempore. All the witnesses summoned on either side are finally discharged.

Mr. WORTHINGTON. May I ask, Mr. President, whether the Senate has adopted any rule in reference to the argument of this case?

The PRESIDENT pro tempore. There has been no action taken by the Senate. The Chair will call attention to the fact——

Mr. ROOT. Mr. President, I ask that Rule XXI be read.

The PRESIDENT pro tempore. With the permission of the Senator who asks for the reading of the rule, the Chair will call attention to the fact that the Senator from Texas [Mr. JOHNSTON], who was sworn in this morning as a Senator, has not been sworn in for the purposes of this trial. The Chair is not informed as to whether it is the desire of the Senator to be now sworn in.

Mr. CULBERSON. Mr. President, my colleague [Mr. JOHNSTON] is not now in the Senate. I believe it is his desire, inasmuch as he has been unable to hear the testimony in the case, not to be sworn in as a Member of the Senate sitting in the impeachment proceedings.

The PRESIDENT pro tempore. The Chair thought it was proper that he should call attention to the fact. That direction will be given, unless there is some other suggestion made in regard to it. The rule suggested by the Senator from New York will be read.

The Secretary read Rule XXI from the "Rules of Procedure and Practice in the Senate when Sitting on the trial of impeachments," as follows:

XXI. The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate, upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

Mr. WORTHINGTON. I will say, Mr. President, so far as we are concerned, we are satisfied to proceed under that rule.

Mr. Manager CLAYTON. Mr. President, I have conferred with my associate, and, if my recollection is correct, I believe that that rule has not been adhered to. I know, as the present occupant of the chair will bear witness, that the rule was relaxed in the last case of this kind before the Senate. It is my recollection also, Mr. President, that it has not been enforced in other cases. I believe that in the Belknap case three managers were allowed to participate in the final argument. Of course, this is a matter that addresses itself to the sound discretion of the Senate.

Mr. President, I desire to say, on behalf of the managers, that they are of the opinion they occupy a position before the Senate in this case somewhat different from that of employed counsel. The Chair is doubtless familiar with that view, it having been heretofore taken by managers in the discussion of questions similar to this and other questions in the trial of impeachment cases.

The managers come here not voluntarily nor for any reward, however honorable it may be to engage in the practice of the noble profession of the law for the honorarium. We have come here, Mr. President, in pursuance of one of the most solemn, and I may say disagreeable, duties that falls to the lot of a Representative. We come imbued with that sense of duty, and we believe that we owe it to the correct exposition of this case before the Senate in the final argument that that rule be not enforced.

It will readily occur to the Senate that there has been one speech already made in behalf of the respondent. The respondent himself has occupied, I believe, on yesterday, something like four hours in presenting his side of this case to the Senate. To-day he has also occupied, I believe, as much as two hours, or three perhaps, as my associate suggests, in putting his side of his controversy before the Senate.

Mr. President, this case is different, of course, from all other cases. The issues of law and fact in this case, I think, are in many essential features different from any other impeachment case that has heretofore engaged the attention of the Senate. The counsel for the respondent said that there was more than one case; that all these different articles involved different cases. In some sort that is true. It involves the necessity of a full and comprehensive review of the law of impeachment; it involves the full and comprehensive review and analysis of the testimony as applicable to the law which the Senate will find to obtain in this case.

Therefore, Mr. President, we think that in view of the fact that counsel for the respondent will be accorded as much time in the presentation of their defense as will be accorded to the managers, of course it is but trite to say that that is right. In view of the fact that the managers are of opinion that this rule should be relaxed, and in view of the other facts that I have suggested to the Senate, the managers on the part of the House would prefer that they be accorded the privilege which heretofore has been accorded managers, to divide the time which may be allotted to them amongst them as they may see fit to distribute it.

There is nothing unusual in this request, and I think the circumstances of the case warrant the managers in asking of the Senate the relaxation of that rule to the extent of whatever time may be accorded to us and that it may be divided as we see fit.

Further, Mr. President, while I am on my feet I desire to say that the suggestion has been made as to the limitation of time. A limitation of time, Mr. President, was never imposed upon the managers except in one case, so far as I now recollect, and that was in the case of Swayne. The Chair will remember that that impeachment trial was brought to a conclusion at almost the very close of the short session of the Congress; it was terminated in the latter part of the month of February according to my recollection. The Congress itself expired immediately on the 4th of March thereafter. There is, I am informed, Mr. President, not such a condition existing now. Of course we know that this is not yet quite the middle of January, and I am informed that the business of the Senate is not so urgent at this time but that a reasonable latitude may be given for the discussion of this case. In fact, Mr. President, I have been told that the Senate is waiting for appropriation bills to come from the House. I do not know but that there may be other matters that some individual Senators may want to urge upon the attention of the Senate; but certainly it is true that neither in the point of limitation as to the time of the remainder of the session nor in the attitude of the public business before the Senate is it necessary to enforce a time limitation, as was done in the Swayne case.

Therefore I submit what I have said as the views of the managers in respect to these two propositions, and I may assure the Senate, if such assurance be necessary, and standing in my responsible place, and with a public duty imposed upon me by the popular branch of our National Legislature, that the managers will not abuse whatever indulgence or whatever latitude the Senate may allow. We will not abuse the patience of the Senate. The managers will conduct such an argument as they feel in duty bound to make to discharge an unsought-for and painful public duty.

The PRESIDENT pro tempore. What is the pleasure of the Senate?

Mr. CLARK of Wyoming. I move that the doors of the Senate be closed for deliberation.

The motion was agreed to. The managers on the part of the House, the respondent, and his counsel withdrew. The galleries having been cleared, the Senate proceeded to deliberate with closed doors. After 40 minutes the doors were reopened.

Mr. GALLINGER. Mr. President, I move that the Senate sitting as a Court of Impeachment adjourn.

The motion was agreed to.

Mr. GALLINGER. I move that the Senate adjourn.

The motion was agreed to; and (at 6 o'clock and 25 minutes p. m.) the Senate adjourned until to-morrow, Wednesday, January 8, 1913, at 12 o'clock meridian.

HOUSE OF REPRESENTATIVES.

TUESDAY, *January 7, 1913.*

The House met at 12 o'clock noon.

The Chaplain, Rev. Henry N. Couden, D. D., offered the following prayer:

Incline Thine ear, O God our Father, and hear our petition. Deliver us, we pray Thee, from the consuming fire of selfishness, the root of all evil, since it checks the growth of the soul, blights the love of the home, corrodes society, and despoils the State or Nation, that we may go about our Father's business in the spirit of altruism illustrated in the Sermon on the Mount and fulfilled in the incomparable life and character of the Master. Amen.

The Journal of the proceedings of yesterday was read and approved.

SPEECH OF PRESIDENT TAFT.

Mr. BROWNING. Mr. Speaker, I ask unanimous consent to print in the RECORD a speech delivered by the President of the United States in New York City last Saturday evening, January 4, 1913, at the Waldorf-Astoria Hotel.

The SPEAKER. The gentleman from New Jersey asks unanimous consent to print in the RECORD a speech delivered by the President of the United States last Saturday evening in New York City. Is there objection?

There was no objection.

The speech is as follows:

Mr. Chairman, Mr. Toastmaster, and my fellow Republicans: In so far as this banquet savors of personal compliment to me and takes on the aspect of my funeral obsequies after the late defeat, I accept the honor with pleasure, and take part in the proceedings with the interest and enthusiasm of one most deeply concerned. It is not usual for the deceased to give very full expression to his feelings at the wake, but I remember that in one of Boucicault's Irish dramas the corpse was sufficiently revived to partake of the liquid refreshment and became the chief participant in the festivities. A few opening remarks directed to the character of the deceased and the manner of his taking off may not, therefore, be inappropriate.

Mr. Bryan said in the course of the campaign that I had been elected to the Presidency by a large majority and would be relegated to private life by a unanimous vote. When I read what he said I thought he was as poetic and as unreliable in his prophecies as usual; but, in truth, nothing but Vermont and Utah prevented a literal fulfillment of his forecast, and he was nearer than ever before in his life to a fact.

I think I have separated myself sufficiently from the humiliation of defeat to be able to look upon the history of my administration with calmness and clearness of vision, affected only by the fact that I was one of the principal actors, and naturally inclined to give the best color to everything which I did or attempted to do. I entered office under certain obligations laid down in a national platform, and I attempted as well as I could to carry them out as I understood them. They could only be carried out by legislation to be enacted by the two Houses of Congress, and therefore it became essential for me to associate myself as intimately as possible with the leaders of both Houses and the majority that controlled each. The leaders of both Houses were Republicans, orthodox, old-time Republicans, men who, justly or unjustly, were called reactionaries, and I secured from them an earnest cooperation that led to the enactment of a number of valuable statutes. In doing so, however, I was brought into opposition to a faction of the Republican Party that had become insurgent and declined to follow the leadership of the dominant majority.

As this faction had supported me for the nomination and some of the older leaders had opposed me, it was charged I had in some way betrayed the insurgents, had forfeited the right to their support, and had surrendered to the regular Republican organization, and had myself become a reactionary. It is difficult for me now, as I look back, to see how I could have pursued a different course, for except in this way I could not have secured the legislation which had been promised.

PAYNE TARIFF WAS REVISION DOWNWARD.

The new tariff law was bitterly criticized, but it was, nevertheless, a revision downward. It has been one of the most useful laws possible in its many provisions, creating a Court of Customs Appeals, giving us an opportunity for a new tariff commission, giving us free trade with the Philippines, providing a maximum and minimum clause, and imposing the best form of income tax—the corporation tax. But for its enactment the deficit of $58,000,000 which stared me in the face when I came into office would have been repeated and increased each succeeding year, and we would have had to resort to bond issues to meet the ordinary running expenses of the Government. Then, by the same agency of the regular Republican majorities, we passed a law which for the first time gave to the Interstate Commerce Commission adequate control of the railroads.

We created a Commerce Court, which, in the interest of the dispatch of business, reduced the time of the remedy of shippers against offending railroad companies from two years to six months. We established the postal savings bank, which has greatly inured to the thrift of that part of the Nation which needs to be taught thrift and requires the incentive of a Government guaranty.

We passed the conservation bill, which enabled us to withdraw all the lands that needed further legislation for their proper disposition in the interest of preserving the national resources for public use. We passed the "white-slave" act, the interstate-commerce employers' liability act, the Mining Bureau bill, and the Children's Bureau bill. We passed the reciprocity agreement with Canada, which produced free trade in natural products between Canada and this country, and which, while it would not have greatly affected farm product prices, would have steadied them and greatly increased business between ourselves and Canada.

On the Executive side, we made treaties of universal arbitration with England and France. We pushed the trust prosecutions as they had never been pushed before, and we have thus in a quiet way prepared a solution of the trust question. We organized an Economy and Efficiency Commission, which has been engaged in pointing out possible consolidations, the correlation of the business of the bureaus, and the introduction of efficient means of business, resulting in an annual saving of many millions; secured, through the action of the Supreme Court, great expedition in equity procedure, and we have recommended to Congress the conferring of the same authority on the court in reference to the proceedings at common law. We have enforced restrictions against rebates and the general fraudulent use of the mails with a rigor and success that has never before been equaled in the history of the Department of Justice. We have kept down the expenses of the Government, so that instead of increasing annually, as they had in recent years, at the rate of $30,000,000 or $40,000,000 a year, they have been reduced from year to year until within a few months, when the new basis of pension allotments increased the appropriations.

FROM PANIC SHADOW TO REAL PROSPERITY.

There has been no scandal connected with the administration. By our intervention in South and Central America we have contributed to the peace of the world in ending revolutions and preventing wars, and we have carried the work of the Panama Canal construction to a point so near completion that the first vessel may proceed on the bosom of the broad ship canal from the Atlantic to the Pacific in October of this year, on the four hundredth anniversary of the day Balboa discovered the Pacific.

Finally, although we entered office in the shadow of a recent panic, during the four years of this administration business has revived, confidence has returned, widespread prosperity is at hand, the demand for labor is greater than ever, and the standard of wages for all classes of labor is higher than ever before in our history.

Now, under these conditions, what was it that impeded my progress as a candidate, and what was the political disease of

which I died? I am hopeful that when historians conduct their post-mortems it may be found that my demise was due to circumstances over which I had no great control, and to a political cataclysm which I could hardly have anticipated or avoided; but, whether this be true or not, even friendly critics are able to point out personal reasons why it was that, though I went in, I also went out, with large majorities.

It has been charged against me that I am an aristocrat, and that I have no sympathy with the common people, and I have no doubt that this impression has gone abroad and has settled deep in the minds of many people. Now, I do not think it is true. I think I am as sympathetic with the common people, as earnestly desirous of their happiness, as anxious to see that they have justice accorded them, and that they enjoy their rights under the law and Constitution as fully and completely as any one. I believe most profoundly that popular government is the best government that we can have, and I am greatly concerned that it shall continue and be successful in giving to the people at large the best measure of individual liberty on the one hand and the greatest practical efficiency in government on the other. It may be that in my earnest desire to make government efficient I have not always explained that I believe that to make government efficient is to work directly in the interest of the common people.

My administration has come and gone in a period of unrest and agitation for something intangible which it is difficult definitely to describe. We have lived during the last four years, and are living now, in an atmosphere of strenuous denunciations of certain evils and loud aspirations for an ideal state in which the common people are to become happier, the poor and the oppressed are to acquire property and cease suffering, and much or all of the change is to be accomplished through the agency of the Government.

The accumulations of swollen fortunes during the two decades preceding, and many of them by an improper means—that is, by a violation of the antitrust law or the antirebate law—aroused a feeling of just indignation and set the tune to public addresses. The notes of denunciation of the malefactors of wealth on the one hand and of promises of rectifying such inequalities by governmental means and increasing the equality of opportunity among the poor rang pleasantly in the ears of the people. They made for the popularity of those who produced the sweet tones, assuring better conditions and a complete social reform, all by means of elections and governmental action.

MANY SOCIAL WORKERS MISLED BY ENTHUSIASM.

Then, too, in the material improvement, in the larger amount of wealth devoted now to education and philanthropy, there has been aroused a most commendable interest in the poor and the suffering. By university settlements and by other means the observation of many well-to-do people is focused on the poor and suffering and the supposed causes which produce poverty, and so intensely enthusiastic do social workers become that they lose their sense of proportion as to the relative number of the poor whom they are laboring for and forget altogether the interest of those who are not dependents and yet who make up a great majority of the common people.

The public has not been content to estimate and weigh the things done at their face value, but has accepted the hostile statements that the good things which were done were done either with an improper motive or because I could not help it, or were really done by somebody else, and that, on the whole, I was unfriendly to the people, a reactionary in spirit, opposed to all reforms leading to the amelioration of the inequalities and sufferings of the oppressed and poor in society.

TIME MAY ENLIGHTEN PUBLIC TO REAL FACTS.

I am not complaining of this situation. I am hopeful that as time rolls by the facts may disclose themselves and may lead people to believe that more real reform has been accomplished in my administration than will ever flow from an attempt to put into practical operation the promises which have been made to the people in recent party platforms and on the stump of a regeneration of society through the instrumentality of government, the making of the rich moderately poor and of the poor moderately rich, and an elimination by statute of all sin, injustice, poverty, and suffering from our country and community.

Time usually brings about an opportunity for retaliation, but if you are a strong man, of good sense, you feel it beneath you when the opportunity comes to exercise it. This personal feeling against me on the part of a number of Senators and Representatives and other members of the party doubtless operates with them as a substantial cause for continued dissension. It gratifies me to feel that my going out of office and public life will remove this cause, will end the "Taftphobia" that has governed the action of some in influential positions, and will tend to end these divisions that have been caused by personal reasons rather than on principle.

REPUBLICAN PARTY IS STILL A FORCE FOR GOOD.

But I have consumed too much time in discussing my personal relations to the late campaign. The chief purpose of this banquet was not to honor me or to soothe my injured pride. It was to show to the country that the Republican Party is still a force in this country for good, and that it is the duty of those who believe this to give a reason for the faith that is in them.

We were beaten in the last election. We ran third in the race. Why is it that we gather here with so much spirit and with so little of the disappointment and humiliation supposed to accompany political disaster? Is it not that in spite of the defeat recorded at the election in November we were still victorious in saving our country from an administration whose policy involved the sapping of the foundations of the democratic, constitutional, representative government, whose appeals to the people were calculated to arouse class hatred that has heretofore been the ruin of popular government, and whose contempt for the limitations of constitutional law and the guaranties of civil liberty promised chaos and anarchy in a country that has until this time been the model of individual freedom and effective popular government?

The result of the Chicago convention was a triumph for the permanence of Republican institutions, the importance of which can not be exaggerated, and I wish to emphasize this, in order that it may be known that we meet in no spirit of despair, but rather to rejoice in a victory for law and order and the institution handed down to us by our fathers.

It is true that we were defeated at the polls by our old-time opponent, the Democratic Party. It is true that they are now going to work out again the problem of eating your cake and having it, too, by showing how it is possible to change from a system of protection for manufactured industries to one of a tariff for revenue only without affecting the industries to their detriment and without halting production or lowering wages. It is true that we are to witness an attempt to satisfy the crying need for a new banking and currency system by a plan which is to embody as many as possible of the features of the Aldrich Monetary Commission plan, disguised as much as may be so as to permit denial of any resemblance. It is true that we are to witness a change of officeholders from Republicans to Democrats, and we are to see how economical the new administration is to be, as compared with the old.

We have been through this before. It may be that this time they can do what they have not succeeded in doing heretofore, and if so, and they can maintain the prosperity of the country at its present record level, then we can be Americans before we are Republicans and rejoice at their success. If they can vindicate their claim that they will reduce the cost of living to a moderate point by reducing the tariff, then they will be entitled to point to this as an achievement fulfilling their promise and vindicating their policy.

If this was all there was to the situation I doubt if we would have this dinner—I doubt if we would be here in such great numbers—because this recurrence of the traditional action and reaction between the two old parties in respect to economic policies is not one so exceptional as to call for noteworthy celebration.

VOTED FOR WILSON TO DEFEAT COL. ROOSEVELT.

The fact that brings us here is that in the late election there were 3,500,000 voters—an irreducible minimum of the Republican Party—who were determined to remain a force in the community, to prevent any constitutional amendment and legislation of a revolutionary program announced by the so-called Progressive Party. Added to that 3,500,000 we may perhaps count another 1,000,000 electors who will stand by us with even more fervor, because they were Republicans sympathizing with the Republican candidate and platform but voted for Mr. Wilson to avert the danger of Mr. Roosevelt's election. The importance of retaining these 4,500,000 voters as a concrete force for the sustaining of our democratic, representative, constitutional government is the chief purpose which calls us here.

It has already been pointed out that there is a spirit of unrest among the people, and that this spirit is what has brought about the division of the Republican Party into the present Republican Party and the Progressive Party.

We are told that the spirit of unrest demands progressive measures that shall bring the people more directly into the operation of their own Government; that shall emancipate the poor from the burden of poverty; that shall introduce social justice, relieve oppression, banish dishonest methods from business, and establish a society founded on altruism and the highest Christian principles of morality. We enthusiastically approve and adopt all these ideals of society, in which every

member is to be prompted by love and charity for his fellow men; in which there is to be no suffering or poverty, because they are to be relieved through the just and generous conduct of those who have toward those who have not.

But what we contend is that in the progress toward such higher ideals, toward a society governed by purer ethics than those which have obtained, we shall not throw away the limitations of law and the principles of government, which have been attained after thousands of years of struggle, which constitute an assurance to each individual in the community against all invasio by other people, whether many or few, of his life, his liberty, his right of property, his right of freedom of religion, his right of free labor, his right of free contract, and his right to pursue happiness in his own way, subject only to the limitations that he yield the same right to others.

DANGER IN UNRESTRICTED RULE OF THE MAJORITY.

What is there in present conditions that the Progressive Party presents which can lead us to suppose that human nature has so changed that no restraint is necessary in all society to prevent one man from oppressing another, or to prevent a majority of us from oppressing an individual or a minority? What is it that constitutional limitations are for in popular government? A popular government is a government by the people—that is, by a majority of the people—who under the law are given the right to exercise the electoral franchise; and constitutional limitations are imposed to prevent the misuse of the power of the majority, so that the individual or the minority may not suffer injustice through the action of the majority.

Where is the security in the present society that the majority may not from time to time do injustice to the minority and to the individual?

It is said that we mistrust the people if we assume that the majority will ever do an injustice. In other words, the contention is that the vote of the majority is always right. Well, as the majority in passing upon a given question determines sometimes one way and sometimes another, in which case is it right?

If the wisdom of our fathers and of the long line of able men who have fought for popular government has led to the introduction into every scheme of government of restraints to prevent injustice by the majority to the minority or an individual, what is there that has happened in recent years to make us feel that a change has come over the character of majorities, so that they may not exercise the tyranny that they have exercised in the past, and in respect of which they have been restrained by constitutional limitation? How are the inequalities of society to be wiped out? How is government to insure happiness to the individual? Is it by equal distribution of property? Is it by taking from one man that which is his and giving it to another who has not earned it? I submit that this is the ultimate result of a thorough analysis of all the theories advanced by the Progressive Party.

PROGRESSIVE APPEALS MADE TO DISCONTENTED.

As one profound political economist said, such schemes usually can be reduced to a combination by A and B to take from C that which is his and confer it on D. A and B do not combine and confer on D what A and B can, but only what C owns. When A and B are anxious to divide what they have and give it to D instead of dividing what C has and giving it to D, we shall reach an era in human history when some of the theories advanced by the Progressives will work in practice. Meantime we must proceed on the theory that A and B are still moved by a desire to keep to themselves what is theirs, and to have the advantage and happiness that may proceed from the ownership of the property they have acquired.

Is there anything in the appeals which are made by the orators for the Progressive Party that leads one to think that they regard their audience moved by a self-sacrificing spirit to give up what they have to be distributed to others less fortunate? On the contrary, are not all the appeals which are made based on the theory that the people addressed will be moved to adopt the reforms advocated by which they themselves will be improved in circumstance and somebody else will lose what is his?

It was urged in favor of the reciprocity agreement that it would reduce the cost of living by having free trade in natural products between Canada and the United States. I did not subscribe to that argument, because I did not believe that it would do other than make a larger reservoir, and thus steady prices and prevent a further increase in the cost of living. But the argument advanced by our Progressive brothers against the Republican candidate with the farmers was that he had favored reciprocity with the idea of reducing the prices at which the farmers sold their products. Did farmers rush forward to support that candidate because of the benefit which it was said would be conferred upon their less fortunate fellow men? Was not every argument advanced in the last campaign to induce the votes of those who heard the argument on the ground that those who heard would be better circumstanced financially if they adopted the theory which was being presented?

In other words, did not the whole campaign illustrate in this respect the very opposite condition from that of a society in which men are moved in their votes and governmental action by altruistic and not by selfish motives? And is not the whole program of the Progressive Party a program which in its ultimate result intends the taking from the successful and conferring on the unsuccessful that which the successful have earned?

If all that it means is that those who have made their money unlawfully or improperly shall be called upon to disgorge it, no one would object to the proposition, however difficult it might be to work out the theory, but when it is considered that such theories can be satisfied only by taking all the property there is and putting it in a common pot and distributing it about without regard to the prudential virtues we are able to see the destruction that will come to modern progress by putting any such theories into effect.

The great and tremendous advantage of the right of property is that it furnishes a motive for man to exercise industry and self-restraint, and the more he improves the general prosperity of the community in which he lives and so the more he helps his fellows. He gives them an opportunity to labor and to save and thus to increase the general accumulation of capital, its general use and its general product, and with the increase in the general product the opportunity for better material living grows, and with the opportunity for better material living the opportunity for better spiritual living comes. The moment that by destroying the right of property you take away the motive for accumulation, the motive for acquisition, the motive for industry and self-restraint, you take away the impulse which has made the world what it is. That is what the history of civilization has shown. No other theory has worked out and has demonstrated its usefulness.

POOR ARE GETTING POORER WHILE RICHES GROW.

We have gone on improving the material and spiritual welfare. The per capita of wealth in this country has increased most largely, the poor are not getting poorer, though the rich may be getting richer, but there has been a general improvement all along the line. We have been developing in individuals greater interest in their fellow men.

We have been cultivating the charitable impulses, forming associations for the intelligent application of charity, associations for the relief of the distressed, and all these movements should receive the highest encouragement from every lover of his kind, but to assume from these movements that business and governmental reforms can be based on a theory that the majority of men will be governed by altruistic and not by selfish consideration, with a view to supporting themselves and their families, and to increasing their possessions, is to fly in the face of the commonest and most clearly accepted fact.

We have been very prosperous in this country, and very happy, and really very free from oppression, in the sense of the deprivation of our liberty or of our property, and so clear and easy has the assumption and retention of our constitutional rights been that we have failed to realize the struggles that were essential in the past to establish those rights and secure them beyond violation.

In other words, we have had so little occasion to assert in formal suit the constitutional limitations to preserve to us that which our forefathers intended to secure by the Constitution that we do not realize that all our rights are dependent on that very instrument, and that the minute you repeal or modify it that minute you become subject to the danger of a tyranny either of an individual or a majority.

These rights, secured by constitutional limitation, when challenged or violated, are to be vindicated through the courts, but under the system which our Progressive friends propose, the limitations themselves are to be subjected to the abolishing power of a referendum; and when they are embodied and enforced in a judgment of a court they may still be lost by a referendum of the judgment to the populace in an election to determine whether the court's decision is right.

Thus it is easily seen that under the Progressive program the whole machinery that has been so carefully built up by the older statesmen of this country and of England to save to the individual and to the minority freedom, equality before the law, the right of property, and the right to pursue happiness is to be taken apart and thrown into a junk heap, and the preservation of such rights or privileges, if you choose to call them such, is to be left to the charitable impulses of a benevolent administrator.

No one at all familiar with the principles of free government and the tendency of erring and power-loving human nature would be content to have his liberty or his right of property or his right to pursue happiness dependent upon the benevolence of anyone.

The Republican Party stands for protection to the Nation's industries, for the retention of the Philippines and the enlightenment of the Filipinos, for widespread education, for those election laws which give the people the best opportunity to express their preference, for all really practical measures which look through the aid of the Government to the relief of the oppressed, but above all it stands for the preservation of the pillars of popular government; it stands for the maintenance of the rights of all, for the greatest good to the greatest number, and it believes that those ends are attainable through the control of the majority properly limited by fundamental law.

OPPOSES ANY SACRIFICE OF PARTY PRINCIPLES.

Now, it has been suggested that the Republican Party can unite again with many of the Progressive Party if only a different rule can be put into force through the convention or the national committee by which the reduction of southern representation could be secured and a fairer method of selecting the candidate for President by the Republican Party could be had.

I have not any objection to any method which shall be fair. That is not a reason for joining or giving up the party. It is the principles that the party advocates that should control one in its support. It is not that the Republican Party is desirous of holding office or power, though neither is to be despised, but it is that in this crisis we feel that we have the means of preventing the country from taking a step which, if taken, will precipitate us into governmental chaos, will set the country on a chimerical chase for an ideal that is impossible to realize, and that in this chase the country will lose the inestimable benefits of a permanent popular government that we have developed after a thousand years of struggle and have created, maintained, and preserved inviolate for 125 years of national liberty. We are not bitter; we are not cast down; we are not vengeful.

If the people of the United States can stand a Democratic administration for one or two or even more terms, we shall certainly not object to their capacity for endurance in this regard; but what we wish to assure ourselves of is that neither through Democratic radicalism nor through the Progressive radicalism shall the pillars of our noble state be pulled down and the real cause of the people be sacrificed to dreams of demagogues and theorists.

Let us buckle on our armor again for the battle for humanity and the common people that must be fought.

Let us invite those Republicans who left us under an impulse that calmer consideration shows to have been unwise to return and stand again shoulder to shoulder with us in this critical time in our country's history.

Let us invite from the ranks of our opponents the Democrats—the many who love the Constitution and the blessings it has conferred on our people—to unite with us in its defense. It must be a campaign of education among the common people against the poison of class hatred, the fanaticism of unbalanced enthusiasts, the sophistry of demagogic promises, and the wiles of false friends of humanity.

REPRINT OF POST OFFICE BILL.

Mr. MOON of Tennessee. Mr. Speaker, I ask unanimous consent for a reprint of the bill H. R. 27148, a bill making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1914, and for other purposes.

The SPEAKER. The gentleman from Tennessee [Mr. MOON] asks unanimous consent for a reprint of the Post Office appropriation bill.

Mr. MANN. Mr. Speaker, I think the gentleman in conversation with me expressed the desire to have a reprint of the bill corrected, and as he has stated it it would not be a mere reprint.

The SPEAKER. The gentleman from Tennessee desires a reprint to conform to the facts and figures. Is there objection?

There was no objection.

WITHDRAWAL OF PAPERS.

Mr. BOOHER, by unanimous consent, was granted leave to withdraw from the files of the House, without leaving copies, the papers in the case of Daniel O'Connor (H. R. 12735), Sixty-first Congress, no adverse report having been made thereon.

INDIAN APPROPRIATION BILL.

Mr. STEPHENS of Texas. Mr. Speaker, I move that the House resolve itself into the Committee of the Whole House on the state of the Union for the further consideration of the bill H. R. 26874, the Indian appropriation bill.

The motion was agreed to.

Accordingly the House resolved itself into the Committee of the Whole House on the state of the Union for the further consideration of the bill H. R. 26874, with Mr. SAUNDERS in the chair.

Mr. STEPHENS of Texas. Mr. Chairman, when we adjourned on last Saturday I had made a point of order against an amendment offered by the gentleman from Montana [Mr. PRAY] after the figures in line 16, page 16, to insert a new paragraph. The appropriation was for $75,000, for the purpose of making certain surveys, which is not incorporated in the bill.

Mr. PRAY. Mr. Chairman, I would like to say a word on the point of order.

The CHAIRMAN. Will the gentleman from Texas [Mr. STEPHENS] yield to the gentleman from Montana [Mr. PRAY]?

Mr. STEPHENS of Texas. For the purpose of discussing the point of order only?

Mr. PRAY. Yes.

Mr. STEPHENS of Texas. I will yield to the gentleman for five minutes, Mr. Chairman.

Mr. PRAY. I do not think it necessary for the gentleman to yield. I ask for recognition to discuss the point of order.

The CHAIRMAN. Does the gentleman from Montana [Mr. PRAY] desire to address himself to the point of order?

Mr. PRAY. I do.

The CHAIRMAN. The gentleman is recognized.

Mr. PRAY. Mr. Chairman, this amendment is for the purpose of enabling the department to survey land on Indian reservations in Montana, land on the Tongue River or Northern Cheyenne Reservation, land within the Fort Belknap Indian Reservation, and for making a meander survey around Flathead Lake, so as to identify the lands embraced within the powersite withdrawal of 100 linear feet around that lake back from the high-water mark for the year 1909, together with other survey work on Indian reservations not provided for in the pending bill.

This amendment, Mr. Chairman, is based upon authority of existing law. The purpose of these surveys is to provide allotments for the Indians. The authority for the surveys, and consequently for this appropriation, will be found in the general allotment act of February 8, 1887, which provides for the allotment of lands in severalty to the Indians, and necessarily the surveys must be made before the allotments can be made.

The CHAIRMAN. Let me ask the gentleman a question. I notice that a part of the amendment provides for surveying lands in the Tongue River and Northern Cheyenne Indian Reservations.

Mr. PRAY. Yes.

The CHAIRMAN. Can the gentleman give the Chair the authority for that particular work under existing law?

Mr. PRAY. That is based, Mr. Chairman, as I regard it, upon the general allotment act which I have quoted and upon which the general appropriation in this bill is based. This amendment carries a specific appropriation for this work which is not intended to be provided for under the general item; and the department has estimated for this appropriation and recommended the performance of this work, and this amendment is in exact accord therewith; and, furthermore, it is authorized by the statute I have cited, and is therefore supported by existing law.

Mr. STEPHENS of Texas. Mr. Chairman, will the gentleman let me call his attention to this fact, that out of this general sum for the survey of lands a portion was used for the survey of lands on the Tongue River and the Northern Cheyenne River? And is the gentleman aware of the fact that for the completion of the survey of lands in the Flathead Lake Indian Reservation some $29,000 was expended last year out of the general appropriation? Is the gentleman aware of that? The general appropriation is in this language:

For the survey, resurvey, classification, appraisement, and allotment of lands in severalty under the provisions of the act of February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians," and under any other act or acts providing for the survey and allotment of lands in severalty to Indians; and for the survey and subdivision of Indian reservations and lands to be allotted to Indians under authority of law, $200,000, to be repaid proportionately out of any Indian moneys held in trust or otherwise by the United States and available by law for such reimbursable purpose and to remain available until expended.

That last clause would fairly cover the purpose of the gentleman's amendment.

Mr. PRAY. I know it is true that up to the close of the fiscal year ending June 30, 1911, $29,000 was taken from the general fund for these surveys on Indian reservations. But a much larger amount is needed at the present time. Therefore

the department officials have asked for a special appropriation of $75,000, and have taken no account of this work in their estimates for the general appropriation this year. Under that general item for surveys they asked for $250,000, and you cut it down to $200,000. Yet I have the positive assurance of officials at the department that they will be unable to use but very little, if any, portion of the general appropriation for these important surveys, and they insist that these surveys should be made at the beginning of the next season.

Mr. STEPHENS of Texas. But we are appropriating in this bill $200,000, and there was a part of the appropriation last year that was not used.

Mr. PRAY. I know about that, and also that you did not come within $50,000 of the general estimates, and I do know, further, that the department will be unable to take any portion of the funds from that general appropriation for the very necessary purpose set forth in this amendment.

Mr. STEPHENS of Texas. If they could take $20,000 of last year, why can they not complete it this year with the appropriation?

Mr. PRAY. They took that amount in 1911, but even so, it was totally inadequate, and they can not do the work without a special appropriation. This amendment is based on existing law, upon the act supporting the general appropriation. And furthermore, the provision included in the amendment in regard to surveys on the Flathead Reservation is based upon the act of a year ago, which provides that an easement in and over all lands bordering on or adjacent to Flathead Lake, which lie below an elevation of 9 feet above the high-water mark of this lake for the year 1909, shall be reserved for use in connection with storage of water for irrigation or development of water power. All patents hereafter issued under this law must include such reservation. It is necessary to make the survey to fix the contour line. The law can not be compiled with without a survey. The estimate for this particular work is $25,000. This is included in the Book of Estimates, and appears in the hearings. The other feature of the amendment relates to survey on the Fort Belknap Reservation—$25,000 is needed for this purpose. The recommendation is noted in the hearings and in the Book of Estimates. This survey is for allotment purposes and authority for the appropriation will be found in the general allotment act before alluded to. This amendment, in my judgment, is not subject to a point of order.

Mr. STEPHENS of Texas. They have used, as I have stated, $20,000 of the general appropriation last year for beginning this survey, and this year we have made an appropriation of $200,000 for completing the survey.

This amendment of the gentleman from Montana is subject to a point of order for the reason that it has not been estimated for, is not in the bill, and does not come legitimately before the committee at this time. It is new legislation.

Mr. PRAY. Mr. Chairman, the gentleman says that this legislation has not been estimated for. He does not mean that.

Mr. STEPHENS of Texas. I mean it is not in the bill.

Mr. PRAY. The department has estimated for it and has said that it is absolutely necessary that they should have the $75,000 recommended. Besides that, it is authorized by the law carrying the general appropriation that was inserted at the beginning of this bill.

This is not the only item affecting Montana estimated for by the department which does not appear in the bill. The department asked for an appropriation of $10,000 for indigent and homeless Indians, such as Chief Rocky Boy and his band of Chippewas and the poverty-stricken Cree Indians who were under Chief Little Bear. This item does not appear in the bill, although there is great poverty and distress among these Indians; and this same condition exists among the aged Indians on some of the reservations. Chouteau County, my home county, expended $6,000 to take care of the Cree Indians during an epidemic of smallpox, and when I introduced a bill in the Sixtieth Congress for reimbursement the verdict was that the liability of the Government was too remote. In my humble judgment the Government is and ought to be liable for the support of helpless Indians. They are the wards of the Government and entitled to help under such distressing circumstances.

This amendment is meritorious and ought to prevail, but it will doubtless meet the same fate as other amendments that have been proposed for the purpose of increasing appropriations. This appropriation is necessary; it is properly estimated for and fully justified in the hearings, and, furthermore, it is authorized by the same law that supports the general item on page 2 of the pending bill.

The CHAIRMAN. The reference that has been made to existing law is urged in support of the amendment. No intelligent ruling can be made on the question in the absence of that law, and the Chair will therefore ask the gentleman from Montana [Mr. PRAY] to send the law to the desk, and the Chair will reserve a ruling on this point of order until he can look at the law which is relied upon.

Mr. STEPHENS of Texas. Shall we proceed with the bill, Mr. Chairman?

The CHAIRMAN. Yes. The Chair states that for the time being we will proceed with the bill, and at a later opportunity the Chair will make a ruling.

Mr. STEPHENS of Texas. Mr. Chairman, I ask unanimous consent that we pass over the item for the present until we can ascertain the authority.

The CHAIRMAN. Without objection, that will be done. The Clerk will read.

Mr. STEENERSON. Mr. Chairman, a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. STEENERSON. I would like to inquire what became of the amendment that I offered on Saturday?

Mr. MANN. Mr. Chairman, the amendment offered by the gentleman from Minnesota on Saturday was passed over without prejudice, with a point of order pending. I made the point of order, and after an examination of the statements in the RECORD of Saturday, I desire to withdraw the point of order.

Mr. FOSTER. Mr. Chairman, I also have a point of order pending, I think. The amendment is just as it was on Saturday, as I understand from the gentleman from Minnesota.

Mr. STEENERSON. Yes; it is pending.

Mr. FOSTER. It occurs to me that this matter should be taken up in the regular way by the Committee on Indian Affairs, to determine whether or not it is advisable to authorize this. And there is a question as to the right of the Red Lake Indians to have an interest in this matter, so that it occurred to me that in view of all those facts this matter ought not to go into this bill.

Mr. MANN. I understood that it was agreeable to the committee. Is not that correct?

Mr. STEPHENS of Texas. Yes.

Mr. STEENERSON. It was considered in the committee.

Mr. STEPHENS of Texas. We have made a favorable report on the amendment. We had a special meeting of the committee and agreed to this amendment; agreed that it might be offered on the floor. It is not in the bill, but I desire to state to the gentleman from Illinois [Mr. FOSTER] that the committee agreed to this amendment at a special meeting.

Mr. FOSTER. But the committee has never reported a bill on the subject and placed in on the calendar.

Mr. STEPHENS of Texas. It has been the custom, Mr. Chairman, for a number of years that the committee could be authorized to offer, through its chairman, on the floor such amendments, and we have followed that custom in this instance, for the reason that the data were not before the committee at the time we reported the appropriation bill; else we would have reported it with the amendment of the gentleman from Minnesota [Mr. STEENERSON].

Mr. FOSTER. It does seem to me that this amendment ought not to be put on at this time, without giving opportunity for a study of this question. I am not saying that this matter is not all right, but it does not occur to me that it ought to go in here.

Mr. STEENERSON. Will the gentleman reserve the point until I can make a further explanation?

Mr. FOSTER. Yes. I have no objection.

Mr. MILLER. Mr. Chairman, before my colleague [Mr. STEENERSON] makes his statement, I would like to call the attention of the gentleman from Illinois [Mr. FOSTER] to the fact that this is the only way to get any legislation through at this session of Congress. It is undoubtedly right that under ordinary circumstances a bill should be introduced and passed upon by the committee and reported to the House and taken up by itself, but under the present condition of things the gentleman from Illinois knows, as every one of us knows, that there will be no legislation on this subject at this session of Congress—that is, this year—unless it is done by way of amendment to this bill. Now, this is not a large item. It is really quite an insignificant item, but it is important to a large number of Indians. Unless this survey can be secured in this bill it will not be secured at all. Unless this drainage survey can be made or authorized within a year, it is probable that it never can be made for the welfare of these Indians.

Mr. FOSTER. Why does the gentleman make that statement?

Mr. MILLER. The allotments may be made up there in that region before it can ever be reached, and if that should be done the opportunity for a survey of this kind would be largely removed.

Mr. STEPHENS of Texas. This is reimbursable, and is an unexpended balance of an appropriation for a survey partly made. The time expired before they could complete the survey, and this provision is for the expenditure of the unexpended balance for the survey.

The CHAIRMAN. Is the point of order made against the amendment?

Mr. STEENERSON. Mr. Chairman, I desire to make a further explanation.

Mr. FOSTER. I will hear the gentleman's explanation, and if it is satisfactory I may withdraw the point of order.

Mr. STEENERSON. I can realize that the zeal of the gentleman from Illinois [Mr. FOSTER] requires him to consider this matter very carefully. I desire to say that it was presented to the committee at a special meeting and approved. Now, this reappropriation is part of an appropriation made reimbursable out of the funds of the Indians, and then, in order to recoup the amount of the expenditure for a drainage survey, the price of the unsold lands originally contributed by the Red Lake Indians, being 1,500,000 acres, was raised 3 cents an acre. Eventually that will bring back into the Treasury more than the sum appropriated or expended for the drainage survey. We have appropriated $35,000 and have spent $30,000. The money was appropriated especially for a drainage survey, and this being money of the Indians, proposed to be expended for the benefit of the Indians, it seems to me that some consideration should be given to those who represent those Indians. It is simply a method of using the property of the Indians for their own benefit, and it is not tenable to say that this money belongs to the United States.

I notice that several erroneous statements were made in the debate on this matter on Saturday. My colleague from Minnesota [Mr. MILLER] in a colloquy admitted that this money, derived from the increase in the price of the sale of the Indian lands, would belong to the United States. Now, that is not correct, because the land was conveyed to the United States under the act of 1889 by the Indians in trust for the purpose of being disposed of, and when the price is increased the trustee does not get the benefit of the increased price, but it inures to the benefit of the cestui que trust. Therefore this money ultimately belongs to the Red Lake Indians who furnished the 3,000,000 acres to be put into the pot and sold to raise the common fund. The act which made the appropriation made it reimbursable, and I can not see why this item should not now be agreed to. I hope the gentleman from Illinois [Mr. FOSTER] will withdraw his point of order, that he will not insist upon it, because it is necessary to have this survey made this summer in order to make the allotment. I do not understand that it is the policy of the department to allot the agricultural lands on the Red Lake Reservation without first making this survey. That is the object of this item—to get a survey and to find out how much agricultural land there is available for allotments in severalty.

It is the first step toward an allotment of lands in severalty. All the agricultural and timber lands on this reservation are now held in common. This has been asked for at three or four meetings, and it seems to me that in view of the fact that the Indians are unanimous, both factions of them, and in view of the fact that the Representative in Congress from that district, who has visited this reservation within the last 60 days and inquired into this matter, is strongly in favor of it, some consideration ought to be given to the wishes of the Indians, whose money we are appropriating, and to the statements of the Representative from that district. I therefore hope that the gentleman will withdraw his point of order.

While I am on my feet I desire to say that the record of the debate of last Saturday does not clearly show what the so-called Eleven Towns were sold for.

To show what was realized from the Eleven Towns, I will print the following statement from the Crookston Land Office:

ELEVEN TOWNS.

During the several councils held by the Red Lake Chippewa Indians during the past summer, reference has been made by many of the older Indians to the matter of the sale of the "Eleven Towns" bordering the west end of the present reservation. It will be remembered that the purchase price as agreed by the Indians for this tract was $1,000,000. The fact of the matter is that this consideration has been exceeded to the benefit of the Indians to the amount of $260,000, as shown by the following letter:

CROOKSTON, MINN., *September 27, 1912.*

Hon. HALVOR STEENERSON,
Crookston, Minn.

DEAR SIR: In compliance with your request we submit the following figures, which are a revision of our report to you under date of March 6, 1912, to and including this date:

Area of Eleven Towns	acres	265,000
Entered to date	do	262,000
Unentered land	do	3,000
Purchase price of land heretofore entered		$1,260,000
Amount paid		1,055,000
Unpaid balance		205,000

The unentered area is subject to sale at the minimum price of $4 per acre.

Respectfully,

A. P. TOUPIN,
Register, Crookston Land Office.

It will be seen that these lands were sold for $260,000 more than the Indians had agreed to take for them under the McLaughlin agreement. So it appears that these matters have been handled with skill by the department, and the Indians are perfectly satisfied that they have been fairly and liberally treated in this matter. I appeal to the gentleman from Illinois [Mr. FOSTER] to allow this survey to be made. Otherwise the whole matter will be delayed for a year.

Mr. FOSTER. Mr. Chairman, in my judgment it is not a good plan to take up a matter of this kind, involving a project of this magnitude, on an appropriation bill, and I think the House probably has some reason to complain if amendments are put on in some other body and come back here for adoption by this House when we have had no opportunity to consider them. But as I am informed by the chairman of the committee, the gentleman from Texas [Mr. STEPHENS], that this matter has been fully considered in the committee and approved, and in view of the statement made by the gentleman from Minnesota [Mr. STEENERSON] who knows the situation, I feel that I am willing to take his word for this and the action of the committee, and I therefore withdraw the point of order.

Mr. STEENERSON. Mr. Chairman, the gentleman from Illinois withdraws the point of order.

The CHAIRMAN. The gentleman from Illinois withdraws the point of order. The question is on the amendment offered by the gentleman from Minnesota.

The amendment was agreed to.

Mr. FERRIS. Mr. Chairman, a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. FERRIS. I may be mistaken about it, but I do not recall that there was any disposition of the pending amendment of the gentleman from Montana [Mr. PRAY].

Mr. MANN. That was laid over temporarily.

The CHAIRMAN. It was agreed to pass that over for the present. The Clerk will read.

The Clerk read as follows:

NEBRASKA.

SEC. 11. For support and education of 300 Indian pupils at the Indian school at Genoa, Nebr., and for pay of superintendent, $52,100; for general repairs and improvements, $4,500; in all, $56,100.

Mr. STEPHENS of Texas. Mr. Chairman, I have a committee amendment which I send to the Clerk's desk.

The Clerk read as follows:

Page 16, line 18, after the word "hundred," add the words "and seventy-five." Line 20, strike out "52,100" and make it "62,300." In line 21, strike out "56,100" and insert in lieu thereof "66,800."

Mr. STEPHENS of Texas. Mr. Chairman, the reason for making that amendment is this: The general bill provides for 300 Indians at the Genoa School, Nebraska. We find that there are enrolled there 373 pupils, and we have made no provision for 73 of them. We find that the bill does not provide for 73 Indians, and therefore on a pro rata appropriation we offer this amendment to cover those 73 Indians unprovided for.

Mr. BURKE of South Dakota. Will the gentleman yield?

Mr. STEPHENS of Texas. I yield to the gentleman from South Dakota.

Mr. BURKE of South Dakota. I wanted to ask the chairman of the committee if the attendance at this school last year was not 375 pupils, in round numbers?

Mr. STEPHENS of Texas. Three hundred and seventy-three.

Mr. BURKE of South Dakota. They conducted the school upon an appropriation that was made for 300.

Mr. STEPHENS of Texas. That is right.

Mr. BURKE of South Dakota. Now it is proposed to increase the appropriation without increasing the attendance, if I understand the chairman correctly.

Mr. STEPHENS of Texas. They were not provided for last year, for the reason that it was not called to the attention of the House or the Committee on Indian Affairs that they had 73 additional Indians in the school there which the appropriation did not cover.

Mr. BURKE of South Dakota. I understood the gentleman to say that the attendance of the school last year was 373—that is, this year—and that they have been able to take care of that number with the appropriation that was made for the school.

Mr. STEPHENS of Texas. My secretary calls my attention to the fact that there were only 318 pupils last year; that is, they had 18 over the 300 that were appropriated for. This

year they have 373 pupils, or 73 above the number appropriated for.

Mr. BURKE of South Dakota. I would like to ask if this was an item passed upon by the committee. I was not able to be present at the last meeting of the committee.

Mr. STEPHENS of Texas. Yes; it was presented, and the committee authorized the chairman to offer this amendment because they have the additional number of pupils there not provided for.

Mr. BURKE of South Dakota. I will call the gentleman's attention to one thing that caused me to make the inquiry, and that is, in considering the bill we did not allow in any case an increase of the appropriation to provide for an attendance greater than we had before.

Mr. STEPHENS of Texas. If that had been called to the attention of the committee at the time we passed the bill we would have provided for 373 pupils or required them not to add that number to the school; but as they were enrolled, and have been for the last six months, from September to the present time, we think they ought to have the present amount.

Mr. MANN. Will the gentleman yield?

Mr. STEPHENS of Texas. Certainly.

Mr. MANN. Is there any deficiency item this year for this school? In other words, if they now have 373 pupils at this school, and the appropriation in the bill is the same as for the current appropriation law, you propose to increase the amount of the bill. Is that based upon the proposition that there is a deficiency appropriation for this year?

Mr. STEPHENS of Texas. I do not understand whether there will be a deficiency or not, for I have not the records before me at the present time.

Mr. FOWLER. Will the gentleman from Texas yield for a question?

Mr. STEPHENS of Texas. I will yield to the gentleman from Illinois.

Mr. FOWLER. I see by the amendment that you increase the appropriation $200 above that of the last appropriation bill.

Mr. STEPHENS of Texas. Ten thousand two hundred dollars, for the reason that we have 73 pupils more than the bill provides for.

Mr. FOWLER. I understand you ran the school last year on $66,200, with the same number of pupils.

Mr. STEPHENS of Texas. No; that is where the gentleman is in error. We only had 318 pupils, and now we have 373.

Mr. MANN. And that included $10,000 for a special purpose that had nothing to do with the maintenance of the pupils.

Mr. FOWLER. I understand there is no deficiency from the last appropriation.

Mr. STEPHENS of Texas. I have not had an opportunity to examine that question.

Mr. FOWLER. Does not the gentleman think the school could be run on the same amount of appropriation for the coming year that was made the last year?

Mr. STEPHENS of Texas. It could, but we only had 318 pupils last year. Now we have 373, and these additional pupils will require the additional amount.

Mr. CLARK of Florida. Mr. Chairman, on last Saturday, while the House was in Committee of the Whole considering the Indian appropriation bill, I was called from the Chamber by a constituent, who detained me for several minutes. During my temporary absence it appears that the Seminole Indians of Florida, and indeed Florida herself, were quite fully discussed by a number of gentlemen. In the course of the debate, which was supposed to relate to a certain item of appropriation for the Florida Seminoles, the following colloquy, as shown by the RECORD at page 998, took place:

Mr. FERRIS. I desire to say to the gentleman that the President has really taken some steps. These Indians in the Everglades are as wild as rabbits, and up to this time they have not been able to do anything with them; but the President has by Executive order set aside a tract of land comprising 85,000 acres, and the Indian Office has tried to get these Indians on it, tried to get hold of them, lasso them, or catch them in some other way and put them on it.

Mr. MANN. This talk about the Indians being so wild is all fudge.

Mr. FERRIS. Well, the Indian Office does not say so.

Mr. MANN. What do they know about it?

Mr. FERRIS. They have been down there.

Mr. MANN. They sent one man on a winter trip, at a cost of $154; that is all they know about it. They do not know anything about it. There never was any occasion for the Government spending a cent on these Indians down there; they are not asking it.

Mr. FERRIS. They have not got sense enough to ask for anything.

Mr. MANN. The gentleman need not be alarmed; they have got a great deal more sense than some of the native Crackers of Florida and are quite able to take care of themselves; they are pretty bright people down there.

It will be observed, Mr. Chairman, that the distinguished gentleman from Oklahoma likens the brave remnant of Seminoles left in my State to "rabbits," and the great leader of the minority, the gentleman from Illinois, solemnly declares that the Seminoles "have a great deal more sense than some of the native Crackers of Florida." Mr. Chairman, I can not allow these statements to go unchallenged and by my silence appear to acquiesce in them; and I ask the House to bear with me for a few moments while I submit a few observations relative to them.

I was amazed when I read the language of the gentleman from Oklahoma, who has so large an Indian constituency, wherein he compares this remnant of a once populous and warlike tribe of Indians to "rabbits." I assert, Mr. Chairman, without the slightest fear of successful contradiction, that no braver people among all the nations and tribes of American Indians ever inhabited this continent than those who followed the waving plume of Osceola. It is true they are uneducated, but that is not their fault. It is the fault of this great Christian Government, which has forcibly deprived them of their all and left them in poverty and ignorance to meet the issues of a new life. If you really wish to help the Seminoles of Florida, establish schools among them, with faithful and competent instructors, and lift them up intellectually, so that they may assume the duties of citizenship and become factors in our much boasted civilization. Let my friend from Oklahoma quit referring to them as "rabbits," but rather let his committee bring in a bill making provision for the education and elevation of these unfortunate people.

But, Mr. Chairman, I desire more particularly to address myself to the reference made by the great minority leader to the Florida "Cracker." Mr. Chairman, "Cracker" is a title proudly worn by every true Floridian, whether he be a son of that great Commonwealth by birth or by adoption. The man who lives in Florida for two or three years, whether he hails from the North, the East, the West, or some other portion of the South, assumes the title of "Florida Cracker," and wears it as a badge of the greatest honor. And why should not he be proud of the distinction, Mr. Chairman? Gen. Edmund Kirby Smith, one of the greatest, one of the manliest, one of the bravest of that magnificent body of men who constituted the commanding officers of the Confederate States army, was a native-born "Florida Cracker." Gen. Edward A. Perry, although born in Massachusetts, was a "Florida Cracker" by adoption, and as brigadier general in the Confederate army illustrated his dauntless bravery and unflinching courage on many hard-fought fields. [Applause on the Democratic side.] Dr. John Gorrie, the gentle and faithful physician who invented the process for manufacturing ice artificially, and thus became the greatest benefactor to humanity of modern times, was a "Florida Cracker." And I could fill the RECORD with the names of individual "Florida Crackers" who have become eminent in some field of human activity, but time will not permit. I can not, however, let this opportunity pass without calling attention to the fact that Florida has only been in the Union for 68 years; the Civil War and other causes delayed her development, and she really only began her march of progress within the last quarter of a century. She is in reality a pioneer State to-day. Her resources have hardly been touched, and no human mind can foresee the vast possibilities in store for her. To the original pioneers, those sturdy Americans, unlettered it is true, but as brave and patriotic souls as ever heard the war cry of the savage, who conquered Florida, is due the credit of giving this magnificent domain to the American Union. [Applause.]

The CHAIRMAN. The time of the gentleman from Florida has expired.

Mr. TOWNSEND. Mr. Chairman, I ask unanimous consent that the gentleman from Florida may continue for five minutes.

Mr. STEPHENS of Texas. Mr. Chairman, I desire to complete this bill to-day, and I shall have to object.

Mr. MANN. How much time does the gentleman desire in which to conclude?

Mr. CLARK of Florida. I will get through in 10 minutes.

Mr. MANN. Then, Mr. Chairman, I ask unanimous consent that the gentleman from Florida may continue for 10 minutes.

The CHAIRMAN. The gentleman from Illinois asks unanimous consent that the gentleman from Florida may continue for 10 minutes. Is there objection?

There was no objection.

Mr. CLARK of Florida. Mr. Chairman, they and their descendants are the people to whom the distinguished gentleman from Illinois refers to as so lacking in sense. These men who blazed the pathway of civilization through the primeval forests, exterminated the wild beasts of the jungle, conquered and reduced to subjection the untutored but warlike and courageous Seminole, may not have been as cultured and polished as the collegian, but they were the bravest of the brave; they were as honest as honesty itself; in their veins flowed the purest

strain of American blood, and their every heartbeat was attuned to the sweet song of human freedom.

Mr. Chairman, the "Florida Cracker" of to-day possesses every element of manhood which made glorious the record of his ancestry, and I repudiate with all the force I can command the imputation that he is not in every essential respect the equal of any man who walks upon the earth.

Why, Mr. Chairman, the very atmosphere of Florida conduces not only to a broadening of the intellectual man, but it tempers and refines the moral sensibilities. The "Florida Cracker" has "sense" enough to keep on the statute books of his State a law which forever makes impossible the shocking of the moral sense of all decent people by the union of a half-witted white girl with a black negro brute. If the culture, refinement, and "sense" of Chicago is exemplified in the recent legal marriage of the negro brute Jack Johnson and that poor, miserable white girl, then may the great God of the heavens and the earth forever deliver my people from the Chicago variety. The "Florida Cracker" has "sense" enough to know that God Almighty never intended that the black crow should roost where the gray eagle builded her nest; he has "sense" enough to know that the Great Creator, for some reason of his own, in the very dawn of human existence, separated the white and black races by insurmountable barriers; and he has "sense" enough to have no patience with that class of alleged white men and women who, having no pride of race, would set aside the solemn decree of the Almighty and by amalgamation bring the proud Caucasian to the level of the brute African and make of this great Republic a Nation of mongrels. He has "sense" enough, decency enough, love of race enough, and enough reverence for the decrees of Almighty God, no matter what the people of other lands and other States may do, to forever preserve the white civilization of Florida from the degradation of social equality with the negro. [Applause on the Democratic side.]

Mr. Chairman, Florida, with her balmy climate, her health-giving springs, her beautiful lakes, her magnificent rivers, her wonderfully productive soil, invites the citizen of every section to come and live and enjoy life within her borders. He will find us a generous, warm-hearted, and hospitable people. We care not where he was born; that is immaterial. We care not what may be his politics or his religion; that is his business. But we do not care to have him come laboring under any mistaken idea as to our purpose to maintain our present civilization. When he comes to Florida he comes to a State where white supremacy obtains and will be maintained; he comes to a State where the virtue of women is the chief corner stone of the structure and will be protected; and he comes to a State where the institutions of our Government are to be preserved as established by the fathers of the Republic. [Applause.]

Mr. STEPHENS of Texas. Mr. Chairman, I ask for a vote on the last amendment.

The CHAIRMAN. The Clerk will report the amendment.

The Clerk again reported the amendment.

The CHAIRMAN. This seems to include more than one amendement. If there be no objection, the amendments will be considered en bloc. The question is on agreeing to the amendments.

The question was taken, and the amendments were agreed to.

The Clerk read as follows:

For pay of 1 clerk at $1,400, 1 financial clerk at $1,200, 1 assistant clerk at $720, and 1 laborer at $720, at Winnebago Agency, Nebr.; in all, $4,040.

Mr. FOWLER. Mr. Chairman, I reserve the point of order on this paragraph. I desire to inquire of the chairman of the committee the necessity for this new legislation. I discover that the bill last session did not carry this appropriation.

Mr. STEPHENS of Texas. Mr. Chairman, I will state to the gentleman from Illinois that this is taken out of the lump-sum appropriation, and that amount is deducted from the lump-sum appropriation because it was considered by the department to be good legislation, so that they could be directed how much they shall expend in this State at this place. This specific expenditure is deducted from the lump-sum appropriation carried in the fore part of the bill. It does not cost the Government any more, and it specifically directs how this amount shall be expended.

Mr. FOWLER. Does the lump-sum appropriation carry an appropriation for the different places that are provided for in this paragraph?

Mr. STEPHENS of Texas. The aggregate amount of the lump sum included this appropriation, but it was thought better legislation to put this provision in the bill, and it was so drafted by the department.

Mr. FOWLER. As a matter of fact does this school have a financial clerk, an assistant clerk, and a laborer at this agency?

Mr. STEPHENS of Texas. In the Winnebago Agency, Nebr., there is a school, and this is for the whole State of Nebraska. There is quite a large agency there—agency buildings—and they have general supervision of all of the Indians in that State. I do not remember the number of Indians, but there is quite a number of Indians in that State. These clerks have to manage the affairs of that agency and do all of the clerical work.

Mr. FOWLER. The gentleman does not answer the question. Have these positions been carried at this agency, at the Winnebago Agency, prior to the bringing of this bill?

Mr. STEPHENS of Texas. They have for a number of years. They have the same number and the same pay. They do the same labor as the others. There is one laborer provided for at $720.

Mr. FOWLER. Mr. Chairman, with the assurance that it costs no more, I withdraw the point of order.

Mr. MANN. Before the gentleman withdraws the point of order, will he still reserve it for a moment until I can ask a question?

Mr. FOWLER. Certainly.

Mr. MANN. Out of what item in the bill is this taken?

Mr. STEPHENS of Texas. The lump-sum appropriation.

Mr. MANN. Yes; but where is the item, the lump-sum appropriation, that carries it now?

Mr. STEPHENS of Texas. The amount is $80,960, for the pay of employees, and so forth.

Mr. MANN. That is for the pay of employees not otherwise provided for?

Mr. STEPHENS of Texas. Yes; lines 14 to 17, page 7:

For pay of employees not otherwise provided for; and for other necessary expenses of the Indian service for which no other appropriation is available, $80,960.

One hundred and twenty-five thousand dollars was carried in that item last year, and we reduced it to $80,960 this year, because we have made this change in several Indian reservations. We thought it was more desirable, and so did the department.

Mr. MANN. As I understood the statement the other day, it was that the reduction was made on account of the agency in Oklahoma.

Mr. STEPHENS of Texas. I think we followed that rule in a good many agencies.

Mr. MANN. There were a lot of special agents in Oklahoma.

Mr. STEPHENS of Texas. The gentleman from Minnesota [Mr. MILLER] is acquainted with that matter.

Mr. MANN. I think the statement was made that the reduction in that item was because there was no provision in the bill this year for certain special agents in Oklahoma, to cover which the amount was increased in the Senate last year.

Mr. MILLER. Mr. Chairman, I think the gentleman from Illinois is correct in that statement; but I think, however, in addition to that deduction, that there is to be made another one for these segregated items. I am not entirely familiar with all of the details of this, excepting that my recollection is distinct that information was furnished the committee, or at least myself when I passed upon the matter in my own mind, that this was a deduction from the lump sum which had been expended heretofore, and, as the gentleman from Texas [Mr. STEPHENS] has well said, similar segregations are to be found in two or three other instances. For one I think it is vastly preferable to have each item segregated by itself, so that when we make appropriations we may know the exact amount that is going to the different places.

Mr. MANN. Of course that depends upon whether it is more expensive, and whether they need all of these employees at this point.

Mr. MILLER. Of course, assuming the expense is not increased, and that the result will ultimately be a decrease. I do not think there is any question but that this is a reduction from the lump sum heretofore appropriated.

Mr. FOWLER. Mr. Chairman, I withdraw the point of order.

The Clerk read as follows:

For the construction of a bridge across the San Juan River at Shiprock, N. Mex., on the Navajo Indian Reservation, to be immediately available, $16,500.

Mr. FOWLER. Mr. Chairman, I reserve a point of order on this paragraph. I desire to ask the chairman the necessity for the construction of this bridge.

Mr. STEPHENS of Texas. I will state that last year a showing was made before the committee sufficient to convince them that it was necessary to construct this bridge, and we appropriated $1,000 for plans and specifications and a survey

across the river at this point. This is what I find the department says in justification of this amendment:

For the construction of a bridge across the San Juan River at Shiprock, N. Mex., on the Navajo Indian Reservation, to be immediately available, $16,500.

This bridge is to replace a bridge at Shiprock, N. Mex., which was totally destroyed by a flood, on October 6, 1911. The San Juan River is a dangerous one to ford, and the loss of the bridge is, therefore, a serious one for the Indians, as well as to the agency employees and white people with whom the Indians have business relations. The proper handling of the affairs of the Indians renders the reconstruction of this bridge imperative, as more than half of the Indians on the San Juan Reservation live south of the river, the agency being located on the north side of it.

In the act of August 24, 1912, Congress appropriated $1,000 for an investigation and report as to the necessity for this bridge and an estimated limit cost thereof, which report has been submitted in accordance with the provisions of the act. (See House Doc. No. 1015, 62d Cong., 3d sess.)

Mr. FOWLER. Who made the investigation?

Mr. STEPHENS of Texas. It was made by the engineers of the Indian Department.

Mr. FOWLER. Have you the report?

Mr. STEPHENS of Texas. I have the report here. It is a public document, No. 1015, Sixty-second Congress, third session.

I will state to the gentleman that if there is a bridge in the United States which should be built, this is the one, because the Indians are all on one side of the river and the business on the other side, and at one time an overflow took out the abutments of the bridge which was there.

Mr. FOWLER. Why is not that in the hearings?

Mr. STEPHENS of Texas. When we had a document setting forth all of this information, it certainly would not have been right or justifiable to cause the Government to have reprinted something that we already had before us.

Mr. FOWLER. While that may be true, those Members who are not members of the Committee on Indian Affairs are not always able to lay thair hands on every piece of information which they desire.

Mr. STEPHENS of Texas. This is a document, I will state, that every man can get by sending to the document room for it.

Mr. MANN. Mr. Chairman——

Mr. CULLOP. Mr. Chairman——

The CHAIRMAN. To whom does the gentleman from Illinois [Mr. FOWLER] yield?

Mr. FOWLER. I will yield the floor to the gentleman from Indiana [Mr. CULLOP] or the gentleman from Illinois [Mr. MANN] for a question.

Mr. CULLOP. Mr. Chairman, I desire to ask the gentleman from Texas [Mr. STEPHENS] a question. New Mexico now being a State of the Union, would it not be the province of that State to build this bridge and tax the property of the people of that State for that purpose, instead of the National Government?

Mr. STEPHENS of Texas. If the gentleman will permit me to state, this bridge was built originally by the Government for the Indians, and was washed away. This is a very large reservation, possibly 100 miles from end to end, and about that distance wide. These Indians, as I have stated, are on the opposite side of the river, where they are occupied in farming, while the railroad and the places in which they do business are on the other side of the river. I am advised that the river is so dangerous on account of quicksands, and so forth, that it is often difficult to get to these places.

Mr. CULLOP. But the property of the people in these towns who get advantage of the trade of the Indians ought to be taxed as other property of that State now is taxed, for the purpose of building this project. They are the beneficiaries and ought to bear the expense of this improvement.

Mr. STEPHENS of Texas. No Indian land is taxable.

Mr. CULLOP. I am not referring to the Indian land, but the other property there which is taxable, the railroad, the stores, the lands of the citizens of the State, just as the property in other States is taxed for public improvement. Why should not this property in the State of New Mexico be taxed for the purpose of building this bridge, which is a public improvement of the State, instead of the United States Government bearing the expense of it?

Mr. STEPHENS of Texas. I yield to the gentleman from New Mexico [Mr. FERGUSSON].

Mr. FERGUSSON. Mr. Chairman, I am personally acquainted with the situation where this bridge is located in New Mexico, and in answer to the gentleman from Indiana [Mr. CULLOP] I will state that the larger part of the reservation where the Indians are located is on the southern side of the San Juan River. The railroad and coal mines are on the north side. When a few years ago they came to establish an agency and a school for these Indians they established it on the north side of the river, for the reason that the railroad and station are on that side and the coal is mined on that side of the river, and therefore they established the agency and school on the side of the river where the railroad was located and where the coal was mined for convenience. So, in answer to the gentleman from Indiana, I will state that it is a part of the Government's business to build this bridge across the river in order to connect the body of the reservation with the other side of the river. It is Government business and not the business of the citizens of the State there. The report of the constructing engineer, which was adopted by the Secretary of the Interior, in recommending this bridge, shows the reasons more succinctly than I can state them, among which are that the river has quicksands, that it is wide and flows over sand, that it is amost for half a year unfordable and impassable, and that the Indians have large numbers of ponies, hides, and wool which they have to transfer across the river. These Navajos are industrious. It is necessary to get across to the railroad and to the towns where the Americans live, where they find a market for their blankets. For half a year the river is unfordable and impassable, as is shown by the Secretary of the Interior in his report in favor of this item. We think it is a part of the Government business. This Government agency is a very large one. The Indians are industrious and prosperous. Their blankets are getting an international reputation and are sold all over the world. They have their sheep and cattle. I have seen in the streets of Albuquerque herds of 200 or 300 ponies brought down to sell. The Indians are worthy of the help that is asked in this matter in order to get across the river to the markets on the other side, to the coal, and to the railroad supplies.

Mr. CULLOP. I would like to ask the gentleman from New Mexico a question if he will permit. How large is the town across the river from this reservation?

Mr. FERGUSSON. I do not remember exactly. I should say it had fifteen hundred to two thousand population.

Mr. CULLOP. Is Farmington the name of the town?

Mr. FERGUSSON. That is not immediately near where this bridge is to be. I have not the exact figures at hand, but if the gentleman desires he can get them. The agency is located on one side of the river, approximately 40 miles west of Farmington.

Mr. CULLOP. Does not the public use this bridge?

Mr. FERGUSSON. To some extent these Indians do business with the general public. That is where they sell their blankets and hides and wool.

Mr. CULLOP. Now, Mr. Chairman, I think the explanation made by the gentleman from New Mexico [Mr. FERGUSSON] of the conditions existing there, and the explanation made by the chairman of the committee, who also is conversant with the conditions there, makes it the more essential that this bridge ought to be built by the citizens of New Mexico under the laws of that State as other public improvements are made. This is not a bridge for the Indians alone, but it is a bridge for public convenience, people of all classes. Their products are taken to market there and put upon the trade of the world. It is a growing commerce, just like the commerce of other citizens and localities, just as the products of other people are turned into the marts of trade. I can see no reason why the people of New Mexico should not be taxed to build this bridge just as the people of other States are taxed for public improvements within their boundaries. In my judgment it would not be right to make the improvements contemplated out of the public funds of the National Government. I hope the gentleman from Illinois [Mr. FOWLER] will insist upon his point of order.

Mr. MILLER. Mr. Chairman, will the gentleman yield?

The CHAIRMAN. Does the gentleman from Indiana yield?

Mr. CULLOP. Certainly.

Mr. MILLER. While I am not familiar with the constitution of the State of New Mexico, I assume that it is similar to the constitutions of other States of the Union, and if so, I ask the gentleman if there would be any authority of law on the part of the legislature of the State, or any of its subdivisions, or the taxing power, to expend the funds of the State or county or city to build this bridge wholly on United States territory, on a United States reservation?

Mr. CULLOP. Oh, that matter could be very easily adjusted by coming to Congress and getting a bill passed, granting permission to build the bridge, just as railroads do it, and just as dams are constructed by private owners. And the taxing power of the State of New Mexico could be invoked to tax the property and raise the funds to build the bridge just as internal improvements are made in every other State of the Union.

Mr. MILLER. I am quite sure the gentleman does not mean just that. I am sure that if he will stop a moment and reflect he will not say that.

Mr. CULLOP. I mean exactly what I say. The Congress has the power to grant to the government of the State of New Mexico the right to bridge any of its streams.

Mr. MILLER. That is absolutely true; but evidently the gentleman did not catch the point of what I intended to say. Perhaps I did not make it clear. There is no power possessed by the State of New Mexico or any subdivision of that State to appropriate the funds of that State to build a bridge wholly upon United States territory or upon a United States reservation.

Mr. CULLOP. Well, if the taxing power of New Mexico does not go that far in building up the public improvements of the State, the internal improvements of the State, its people have been neglectful in exercising the powers which the legislature of that State should have exercised in building up and advancing the best interests of the State. Every other State, practically every other one, is exercising just such a power as that. New Mexico could do so if it exercised the powers granted it.

Mr. MILLER. I beg to differ with the gentleman.

Mr. CULLOP. I hardly know of any State that has the power to make a law to tax the property of a locality for public improvements, a power which is not denied under the Federal Constitution and is provided for in the constitutions of the several States of the Union. It could easily get authority from the National Government to construct this bridge, though it be located on Federal property.

Mr. MILLER. We do not differ on that at all; but I still have not made myself clear, I am sorry to say. While the State of New Mexico undoubtedly possesses the powers for public improvements similar to those possessed by other States, neither New Mexico nor any other State has the right or power to appropriate its money to build an improvement on anybody else's territory. In this case it is the territory of the United States. It has no more power to do that than it has the right to appropriate money to build a bridge in Alaska, or on the moon, or in Germany, or in Indiana. [Laughter.]

Mr. CULLOP. Oh, that is not the proposition involved here. Here is property in the State of New Mexico which is subject to the control of that State. I understand that it is Federal property, and the Federal authorities can grant a concession to build the bridge. They have that right, and so has Congress the right to do it. This is not for the Indians alone, but it is for the general public of New Mexico. It is for the convenience of the general public in that section of that State, and is required as well for the requirements of the general public as for the Indians residing in that locality. It will improve the property of all, and the public good will be served by its erection, and for this reason I contend the people of that State should bear the expense thereof and not the National Government. In my judgment, there is a growing tendency to relieve the States of matters of this kind and fasten them on the Federal Government. This practice is unjustifiable and should not be employed. This particular matter belongs to the State of New Mexico and it should bear the cost of it, as it is the direct beneficiary of the good which will flow from this improvement.

Mr. CARTER. Mr. Chairman, will the gentleman yield to me for a moment?

The CHAIRMAN. Does the gentleman from Indiana yield to the gentleman from Oklahoma?

Mr. CULLOP. Certainly.

Mr. CARTER. I do not now recall just what the constitution of New Mexico provides, but I know the constitution of Oklahoma sets forth that the taxes or funds of one community can not be used to build public improvements in another community.

Now, the gentleman will understand that here we have, as has been stated by the gentleman from Texas [Mr. STEPHENS], who is in charge of the bill, a reservation of 100 miles square. There are no taxable lands; there is not property there of sufficient taxable value to build this bridge, so that it would be an impossibility to build the bridge, under the constitution of most States, unless the Federal Government did build it, because the taxable values do not exist within the community where the bridge is to be built.

Mr. FOSTER. I would like to ask the gentleman, if I may be permitted, whether the Sante Fe Railroad does not run through there, and whether that property is not subject to taxation?

Mr. CARTER. I understand that the Sante Fe Railroad does run through it, but how much of it is in this community and can be taxed for the purpose of building this bridge I do not know. Can any man say that there is sufficient mileage and property values of the Sante Fe Railroad there to build this bridge?

Mr. CULLOP. I would like to ask the gentleman this: How is it that a town of 2,000 population has been built up there? Where did it get the title to the improvements?

Mr. CARTER. That may be done in several ways. The town sites may have been disposed of. That would be one way.

Mr. STEPHENS of Texas. Mr. Chairman, I ask that all debate on this paragraph be ended in five minutes.

Mr. MANN. Mr. Chairman, I desire to be heard on this for a moment.

Mr. STEPHENS of Texas. I understood that the gentleman from Illinois had withdrawn his point of order.

Mr. MANN. I had not.

Mr. STEPHENS of Texas. Then, Mr. Chairman, I desire gentlemen to confine their remarks to the point of order and not to the general legislation in this bill.

Mr. CULLOP. The point of order is reserved. Now, in reply to what the gentleman has said——

The CHAIRMAN. The gentleman from Texas makes the point of order that the gentleman from Indiana must confine himself to a discussion of the point of order.

Mr. FOSTER. Mr. Chairman, I ask unanimous consent that the gentleman from Indiana have five minutes in which to discuss this question.

The CHAIRMAN. The gentleman from Texas asks unanimous consent that the gentleman from Indiana have five minutes. Is there objection?

Mr. STEPHENS of Texas. I shall have to object. I think we have had quite sufficient discussion, and the consideration of this bill must be concluded at some time. I therefore demand the regular order.

Mr. CULLOP. Let me have two minutes. That is all I care for.

Mr. FOSTER. I ask that the gentleman from Indiana have two minutes.

The CHAIRMAN. Does the gentleman from Texas withdraw his demand for the regular order?

Mr. STEPHENS of Texas. I will if we can close the debate on this at the end of seven minutes. The gentleman from Illinois [Mr. MANN] desires five minutes to reply.

The CHAIRMAN. Will the gentleman include that in his request for unanimous consent?

Mr. STEPHENS of Texas. I ask unanimous consent that all debate be closed in seven minutes, five minutes to go to the gentleman from Illinois [Mr. MANN] and two minutes to the gentleman from Indiana.

Mr. MONDELL. I hope the gentleman will not insist on that. I should like to have five minutes.

Mr. STEPHENS of Texas. Then I will make it 12 minutes if that is agreeable.

The CHAIRMAN. The gentleman from Illinois asks unanimous consent that the present debate be concluded at the end of 12 minutes, five to be occupied by the gentleman from Illinois [Mr. MANN], five by the gentleman from Wyoming [Mr. MONDELL], and two by the gentleman from Indiana [Mr. CULLOP]. Is there objection?

There was no objection.

Mr. CULLOP. Now, Mr. Chairman, in reply to the gentleman from Oklahoma upon this proposition, I have been informed that since 1866 there has been a Federal concession for improvements over lands of this character. Now, the Santa Fe Railroad runs through this reservation, or near it.

Mr. FERGUSSON. The nearest town on the south is about 150 miles away.

Mr. CULLOP. A city has been built up of probably 2,000 population. The power rests with the legislative branch of the government of New Mexico to legislate upon this question, to tax property owned by individuals for the purpose of making public improvements of this kind, and that power in instances of this kind ought to be employed by the States and not by the General Government. The State and its people get the advantage of such public improvements, and in common justice ought to pay for the same.

Mr. CARTER. Will the gentleman yield for a question?

Mr. CULLOP. Yes; if it is a short one, as I have but little time.

Mr. CARTER. I want to ask the gentleman if he knows that the town he speaks of is 34 miles from this bridge?

Mr. CULLOP. If you will tax the property of citizens of New Mexico to build this bridge out of State revenues, you will bring the town that much closer to them. That will be the result of that. It will build up their property, enhance values, and they will take an interest in the expenditure of their own money as a general result. In my judgment it is not right or proper for the Federal Government to be building bridges of

this kind across these streams at the expense of the general public, when they are solely of a local character, for the purpose of improving the property of the citizens of New Mexico and advancing the best interests of the commerce of that State. I think improvements of this kind should be built by the local authorities and not by the General Government. The benefits derived are of a local nature and tend to develop the localities wherein situated, and the expense therefor should be borne by the people and property affected on account of the improvement.

The CHAIRMAN. The time of the gentleman has expired.

Mr. MANN. Mr. Chairman, may I inquire of one of the gentlemen how many Indians there are living south of the river?

Mr. STEPHENS of Texas. I will yield to the gentleman from New Mexico [Mr. FERGUSSON].

Mr. FERGUSSON. I do not know exactly. There are 23,000 or 24,000 Indians, according to the statement of the Secretary of the Interior, and he says the vast majority of them live south of the river.

Mr. MANN. I notice that when the superintendent at Denver wired to the superintendent of the agency at Ship Rock for information he said, "Mail at once number of Indians living south of river." Then he asked him to mail any other data for use in reports justifying need of bridge. Apparently the superintendent at the agency did not think that to state the number of Indians south of the river could be used in justifying the need of the bridge, because, although he had been specifically directed to give that information, the only specific direction in the telegram, he did not give it, and in the report which he made he entirely failed to comply with the only specific request in the order that was given to him, namely, to give the number of Indians south of the river. The gentleman may have it.

Mr. FERGUSSON. Will the gentleman permit me to call his attention to this statement in the report of the Secretary of the Interior——

Mr. MANN. I will if he gives the number of Indians south of the river.

Mr. FERGUSSON. He says the most of them live on the south side of the river.

Mr. MANN. That does not give the information we are entitled to. Now, I call the attention of the gentleman from New Mexico to this proposition in the report of the agent to the superintendent. He stated this:

> A bridge at this place will not only be a great benefit and convenience to the Government in carrying on the agency work here and to the Indians, but it will be a great convenience to the white people of this valley who make frequent trips across the reservation to sell the products of their farms in towns along the Santa Fe Railroad.

It is proposed to have the Government of the United States build the bridge, although apparently it is mainly for the convenience of the white people who live in the valley and who are assumed to own their property, in order that they may make trips across the river and carry their products to towns along the Santa Fe Railroad.

Mr. FERGUSSON. The nearest town is something like 150 miles south, and this agency is 100 miles square. A large part of the business of the Government is on one side of the river and part is on the other side of the river, and the river is impassable during a part of the year.

Mr. MANN. Last year we made an appropriation for the purpose of ascertaining the facts with reference to this, and the only fact that is given in the report as the result of this appropriation of $1,000, outside of the engineering facts, is that this will be a great convenience to the white people of the valley for carrying their products to the towns along the Santa Fe Railroad.

Mr. FERGUSSON. It is a convenience to some of the white people.

Mr. MANN. I have no doubt it is desirable to have the bridge. I think the people of New Mexico—the white people who use the bridge—ought to build one.

Mr. MONDELL. Mr. Chairman, in discussing a matter of this kind it is a good idea to understand the facts. If I misunderstood the situation, as does the gentleman from Illinois and to a greater extent the gentleman from Indiana, I think I should take their view of it. The gentleman from Indiana suggests that the Government should not build the bridge, and the gentleman from Illinois, quoting from the report, also suggests that because of the fact that occasionally the white people use this bridge it ought not to be built by the Government. The gentleman from Indiana emphasizes the fact that there is a town of 2,000 people—the town of Farmington—the inhabitants of which might occasionally use this bridge. Farmington is 30 miles from the site of this bridge. It is on another river—the Las Animas. The ford across the San Juan is dangerous, as I have personal knowledge.

A bridge is absolutely necessary to connect the two parts of the Navajo Reservation, and also to bring the part of the reservation lying south of the river where practically all of the Indians live in communication with the country in the north where the Indians sell their products. There may be occasionally a white man who would go from Farmington or Aztec to the towns on the Santa Fe over this bridge, but I can not understand why they would do that when they have a railroad at their door.

The people of New Mexico have built bridges across the Las Animas which enables the inhabitants to reach Farmington from the north side of the river. The people of New Mexico have fulfilled their duty in the matter. Some one should build this bridge; it ought not to be the people of New Mexico. I think the item should be reimbursable, for I believe the Indians will be able to ultimately pay for it. This bridge is wholly on the Indian reservation, and it is primarily for the benefit of the Indians. It is far within the borders of the reservation. The Navajos make fine blankets, which find a ready market, and carry on agricultural pursuits, and the bridge is necessary so that they may have communication with the north and sell their products. It is idle to talk about the people of New Mexico building the bridge. They have already built bridges in the territory adjacent to the reservation. It is idle to talk about asking them to build this bridge wholly within the reservation far from its borders.

Furthermore, this very bill contains a provision for the continuation of an irrigation project on the San Juan, and the necessity for communication between the north and south sides of the river is increasing and will be increased by the construction of the reclamation project.

Mr. MADDEN. Will the gentleman yield?

Mr. MONDELL. Certainly.

Mr. MADDEN. I would like to ask the gentleman whether the aqueduct that will carry the water is to be built across the bridge and whether the bridge is to be built for the purpose of carrying the aqueduct?

Mr. MONDELL. I do not know that there is to be any aqueduct. The San Juan project is, I think, on the north side of the river. These Indians make blankets. They are highly advanced in their way, and this bridge is on their territory. I think the item ought to be made reimbursable, but the item must be provided for in this bill. The people of New Mexico have not the funds to build it, and I doubt if they have the legal right to build it. They certainly ought not to be required, in addition to building bridges across the rivers of the State outside of reservations, to go into Indian reservations and build bridges there.

The CHAIRMAN. The time of the gentleman from Wyoming has expired.

Mr. STEPHENS of Texas. Mr. Chairman, I am willing to accept the suggestion of the gentleman and make this item reimbursable. The Indian lands have not been sold but they have a vast territory which when sold I am told will be worth $5,000,000.

Mr. FOWLER. Mr. Chairman, I desire to say that I do not wish to obstruct the progress that is now on for the construction of this bridge. I feel it is necessary that it should be constructed but I do not believe that the United States ought to build it. I understand that the Navajos are a very rich tribe and the people have something like $5,000,000 wealth; that this property where this bridge is to be constructed will be wholly upon their land and if it can be made reimbursable I will agree to withdraw the point of order, and yet I do not think that the Indians ought to build the bridge entirely. I believe the whites use it and ought to be required to help build it the same as the Indians, but in order to get out of the tangle I am willing to withdraw the point of order provided the sum will be made reimbursable.

Mr. MANN. Mr. Chairman, I renew the point of order.

The CHAIRMAN. The point of order is a very plain one and it is sustained.

Mr. STEPHENS of Texas. Mr. Chairman, I will offer the following amendment.

The Clerk read as follows:

> For the construction of a bridge across the San Juan River at Shiprock, N. Mex., on the Navajo Indian Reservation, to be immediately available, $16,500, the same to be reimbursable out of any funds said Indians may have or will have in the Treasury.

Mr. MANN. To that, Mr. Chairman, I reserve a point of order. I suggest to the gentleman from Texas to let it go over a little while.

Mr. STEPHENS of Texas. Mr. Chairman, I ask unanimous consent to pass the item at the present time.

The CHAIRMAN. Unanimous consent is asked to pass this amendment temporarily and return to it later. Is there objection?

There was no objection.

The Clerk read as follows:

For the pay of one special attorney for the Pueblo Indians of New Mexico and for necessary traveling expenses of said attorney, $2,000, or so much thereof as the Secretary of the Interior may deem necessary.

Mr. CULLOP. Mr. Chairman, I move to strike out the last word, for the purpose of asking the chairman a question about this item. I notice here that you have an appropriation in this item for the pay of an attorney for the Pueblo Indians, but there is no such item, so far as I have observed, for any of the other tribes. Why is it that an appropriation is made to employ an attorney for this particular tribe of Indians?

Mr. STEPHENS of Texas. Mr. Chairman, I will state to the gentleman that the Pueblo Indians are not one tribe, but that there are many of them, possibly 10 or 12. The word "pueblo" is the Spanish name for town. They are town Indians. They have been there for several hundred years. Those Indians have been farming, and they have Spanish grants for their lands. The boundaries of these grants are indefinite. Farmers came in there, and questions arise in dispute between the farmers and the Indians. I will state that the lands are on the Rio Grande River. Some of the land is irrigable. Since the country has been settled up the white people have been infringing upon the lands of the Indians, and the grants not being well defined the Indians have constant troubles with their neighbors. The Indians, not being acquainted at all with the laws of the country, it has been deemed necessary that the Department of the Interior protect them. This item has been carried in the bill for several years, for the purpose of protecting those helpless Indians living in these pueblos, or towns.

Mr. CULLOP. Are these civilized Indians?

Mr. STEPHENS of Texas. As much so as any Indians could be. They were the original Indians found on this continent. They are possibly the survivors of the mound builders, as far as I know, and the cave dwellers were perhaps a part of these same Indians. That seems to be the best thought of the men who have studied this question.

Mr. CULLOP. Do they carry on farming?

Mr. STEPHENS of Texas. Yes.

Mr. CULLOP. And stock raising and other business?

Mr. STEPHENS of Texas. Yes; more than any other Indians in the country.

Mr. CULLOP. And this attorney is simply to protect their titles as originally granted to them for their lands?

Mr. STEPHENS of Texas. Yes; by the Spanish Government. I will state that several suits are now pending.

Mr. CULLOP. Mr. Chairman, I withdraw the point of order.

The Clerk read as follows:

For support and education of 100 Indian pupils at the Indian school, Bismarck, N. Dak., and for pay of superintendent, $18,200; for general repairs and improvements, $2,000; in all, $20,200.

Mr. FOWLER. Mr. Chairman, I move to strike out the last word for the purpose of asking the reason why the appropriation for this agency is cut down from what it was two years ago by the sum of $2,500?

Mr. STEPHENS of Texas. There was the construction of new buildings last year, and they have been completed. It was not necessary to longer carry the item.

Mr. FOWLER. Is that for the waterworks?

Mr. MANN. The provision was for the purchase of water and irrigation for the growing of trees, shrubs, and garden truck.

Mr. FOWLER. Yes; that is the item. I withdraw the pro forma amendment.

The Clerk read as follows:

For support and education of 400 Indian pupils at Fort Totten Indian School, Fort Totten, N. Dak., and for pay of superintendent, $68,500; for general repairs and improvements, $6,000; in all, $74,500.

Mr. STEPHENS of Texas. Mr. Chairman, I offer the following amendment, which I send to the desk and ask to have read.

The Clerk read as follows:

Page 19, line 8, after the figures "$6,000," insert the following:
"For construction of power house recently destroyed by fire and for installation, repair, and improvement of heating and lighting plant, $15,000, to be immediately available."

Mr. MANN. Mr. Chairman, on that I reserve the point of order.

Mr. STEPHENS of Texas. Mr. Chairman, I desire to state that the heating and lighting plant burned down a few weeks ago. That came to the knowledge of the committee since the bill was reported to the House. This is one of the few items that is an emergency item which the committee has authorized me to present to the House in the form of an amendment. The gentleman from North Dakota [Mr. HELGESEN] can explain the item, as this is in his district.

Mr. CULLOP. Mr. Chairman, I would like to ask the chairman a question. Was there any insurance carried on the building?

Mr. STEPHENS of Texas. I am not able to say, but possibly the gentleman from North Dakota can.

Mr. MANN. Oh, the Government does not carry an insurance.

Mr. CULLOP. It is not the policy of the Government to carry insurance?

Mr. STEPHENS of Texas. I understand it is not.

Mr. HELGESEN. Mr. Chairman, on the 28th day of November last the heating and lighting plant of the Fort Totten Indian School was burned. We were notified by telegraph, and I took the matter up with the Indian Department. The department told me they had sent an engineer out there to look it over and that he would make a report. In the course of time the engineer returned and made his report, and Mr. Abbott sent me the following communication, together with the proposed amendment, which I will now read:

The heating and lighting plant at the Fort Totten Indian School, N. Dak., was destroyed by fire on the morning of November 28, 1912. It is imperative that the item herewith be incorporated in the Indian appropriation bill in order that the school may be provided with heat and light during the coming winter. The appropriation should be made immediately available.

It is only necessary to point out the fact that it is practically impossible for the children and employees to occupy these school buildings without an adequate heating plant, because of the extreme cold climate. The Indian Service is now attempting to heat a portion of the buildings by means of stoves, which are entirely inadequate and are also dangerous because of the probability of fire.

The school plant is without a lighting system and oil lamps are being used, which add to the danger of fire and are wholly inadequate.

The Indian Service has provided a temporary power house, which should be supplemented with a permanent structure at the earliest possible moment.

This is one of the largest schools of the country. It has about 400 pupils. The average attendance is 383 according to the report, and in the cold climate that we have in North Dakota it is utterly impossible to get along with stoves, as they are attempting to do now. There are 34 buildings altogether. This school occupies the site of old Fort Totten and the buildings formerly used as a fort are partly used for this school. There are 20 of these buildings heated by this central heating plant, and without the rebuilding of this plant it would be impossible to conduct the school. A school that is so large that it has an attendance of about 400 it seems to me is entitled to immediate relief in a case of this kind. I do not think it is necessary to go into details in regard to the size of the school.

Mr. MANN. Will the gentleman yield?

Mr. HELGESEN. Certainly.

Mr. MANN. The gentleman, of course, knows that this bill will not become a law until the 4th of March next at best, in all probability.

Mr. STEPHENS of Texas. It is to be immediately available.

Mr. MANN. But it can not be available until it becomes a law.

Mr. STEPHENS of Texas. We hope it will become a law very soon.

Mr. MANN. But the gentleman from Texas does not think there is any likelihood of this bill becoming a law until the 4th of March, does he?

Mr. STEPHENS of Texas. No; and then there will be several months of the school.

Mr. MANN. This is a deficiency item. It does not have any place in this bill at all. If these buildings were burned recently, the department ought to make an estimate for a deficiency appropriation, which might become a law at the early part of this month, if it is reported out by the Committee on Appropriations, which would have jurisdiction. However, I shall not make the point of order. I withdraw the point of order, although it was stupid on the part of somebody in the department in not making a proper estimate in a proper manner, to get the money speedily available. I withdraw the point of order.

The CHAIRMAN. The question now is on the amendment.

The question was taken, and the amendment was agreed to.

Mr. STEPHENS of Texas. I ask unanimous consent that the total be changed so as to correspond to the additional item.

The CHAIRMAN. Without objection it will be so changed.

There was no objection.

The Clerk read as follows:

For fulfilling treaties with Pawnees, Oklahoma: For perpetual annuity, to be paid in cash to the Pawnees (article 3, agreement of Nov. 23, 1892), $30,000; for support of 2 manual-labor schools (article 3, treaty of Sept. 24, 1857), $10,000; for pay of 1 farmer, 2 blacksmiths, 1 miller, 1 engineer and apprentices, and 2 teachers (article 4, same treaty), $5,400; for purchase of iron and steel and other necessaries for the shops (article 4, same treaty), $500; for pay of physician and purchase of medicines, $1,200; in all, $47,100.

Mr. CULLOP. Mr. Chairman, I move to strike out the last word. I want to ask the chairman a question. I see that you have grouped here certain laborers and made a sum total for the pay of the whole number.

Mr. STEPHENS of Texas. In what line?

Mr. CULLOP. Lines commencing with line 4, page 21—

1 farmer, 2 blacksmiths, 1 miller, 1 engineer and apprentices, and 2 teachers, $5,400.

Why were not those items and amounts specified for each?

Mr. STEPHENS of Texas. I will say to the gentleman that this is a treaty item, fulfilling the treaty, and we followed the language of the treaty.

Mr. CULLOP. And this money must be paid whether the employees are used by them or not?

Mr. STEPHENS of Texas. Until the expiration of the treaty.

Mr. MANN. And, if the gentleman will permit, these people are not actually employed.

Mr. CULLOP. I understand; but I would like to know if when they do not employ persons for these occupations whether or not the money is paid out for that purpose or belongs to the Indians.

Mr. MANN. There is a provision in the bill always providing that if a person is not employed the money shall be used for other purposes.

Mr. STEPHENS of Texas. And distributed.

Mr. CULLOP. For other purposes?

Mr. STEPHENS of Texas. It was a general fund, and that was the name of the fund, although it may be applied for other purposes.

Mr. MANN. Of course, they have no use for these people.

Mr. CULLOP. That is what I wanted to know. I withdraw the pro forma amendment.

The Clerk read as follows:

FIVE CIVILIZED TRIBES.

SEC. 18. For expenses of administration of the affairs of the Five Civilized Tribes, Oklahoma, and the compensation of employees, $150,000; *Provided*, That during the fiscal year ending June 30, 1914, no moneys shall be expended from the tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress, except as follows: Equalization of allotments per capita and other payments authorized by law to individual members of the respective tribes, tribal and other Indian schools for the fiscal current year under existing law, salaries and contingent expenses of governors, chiefs, assistant chiefs, secretaries, interpreters, and mining trustees of the tribes for the current fiscal year, and attorneys for said tribes employed under contract approved by the President, under existing law, for the current fiscal year: *Provided further*, That the Secretary of the Interior is hereby authorized to continue the tribal schools of the Choctaw and Chickasaw Nations for the current fiscal year.

Mr. MANN. Mr. Chairman, I move to strike out the last word, for the purpose of asking whether, in line 15, the language reading "for the fiscal current year" is not an error?

Mr. STEPHENS of Texas. It is an error. I move that the words be transposed.

The CHAIRMAN. Without objection, it is so ordered.

There was no objection.

Mr. BURKE of South Dakota. Mr. Chairman, I move to strike out the last word. I want to state that this appropriation of $150,000 in my judgment is not sufficient to provide the necessary administration in the Five Civilized Tribes in Oklahoma. The officials in charge of the Five Civilized Tribes estimated for the next fiscal year that $250,000 would be necessary to carry on the work of administering the affairs of the Indians comprising the Five Civilized Tribes. The department, as I recall, only estimated for $200,000. The appropriation last year, I think, was $200,000 or $250,000. In the portion of the bill that provides an appropriation for special agents $50,000 was carried last year with the understanding that it was to be used for the pay of district agents throughout the Five Civilized Tribes. The estimate this year included $50,000, which had been eliminated, so that there is a difference, if the appropriation last year was $250,000, of $100,000. I believe, Mr. Chairman, that one of the most necessary things for us to do is to continue the district agents. The gentleman from Oklahoma [Mr. FERRIS] I am sure will make the same argument that he has made heretofore, that there are employed at Muskogee alone 500 employees, and that there is expended $1,300,000, which I think are the figures which he usually uses. Now, I am going to discuss, perhaps, a little further on, the number of employees at Muskogee, but I want to state now that I do not think it is a question of how many employees there may be, but the question is are there any employees whose services are unnecessary? That ought to be the question and not the number of employees. I find upon referring to the report of the Commissioner of the General Land Office that there are something like 500 employees in that office, and that under that bureau, in all the different branches, there are something like 1,400 or 1,500 employees. That I submit is no argument that there are too many, without something being asserted to show that the force might be reduced without injury to the service. I think this item of $150,000——

Mr. STEPHENS of Texas. Will the gentleman yield at that point?

Mr. BURKE of South Dakota. Certainly.

Mr. STEPHENS of Texas. Is it not a fact that the last of the lands of the Choctaws and Chickasaws have been sold, except some small parcels of asphalt and oil lands?

Mr. BURKE of South Dakota. It is not a fact at all.

Mr. STEPHENS of Texas. There is very little left.

Mr. BURKE of South Dakota. Perhaps I had better say what I am going to say now, rather than further on, if the committee will indulge me. I will detain the committee but a short time.

The CHAIRMAN. The time of the gentleman from South Dakota [Mr. BURKE] has expired.

Mr. STEPHENS of Texas. I ask that the gentleman's time be extended 10 minutes.

The CHAIRMAN. Is there objection?

There was no objection.

Mr. STEPHENS of Texas. I hope the gentleman will admit that some of the Choctaw and Chickasaw lands have been sold. I think all have been sold, although there may be some small remnants, and it may be that some of the Seminole lands have been divided among them.

Mr. BURKE of South Dakota. I will say to the gentleman—and I hope some of the gentlemen will discuss that feature of it—that of the appropriation of $250,000 estimated for, $50,000 was in the item for the pay of special agents, and that only $15,000 of the amount is to be expended in the administration of the office of the Commissioner to the Five Civilized Tribes. The money estimated for, all but $15,000, is to be expended for administering the affairs of individual incompetent Indians, for district agents, the payment of the several employees of the district agents, and the general administration of their affairs, and only $15,000 of the amount is to be used in the office of the Commissioner to the Five Civilized Tribes.

The gentleman from Oklahoma [Mr. FERRIS] has repeatedly stated, and stated it only recently, that there were 500 employees in the office at Muskogee alone, and that about $1,300,000 was being expended there annually. I am going to state—and I will say that I have obtained this information from the department, so that it is reliable—that during the fiscal year ending June 30, 1912, there was an average of 62 employees in the office of the Commissioner to the Five Civilized Tribes. Their salaries aggregated $69,338.80. The total number of employees on December 26, 1912, including the commissioner, was 51. The total number of employees in the office of the Union Agency June 30, 1912, was 104.

The Union Agency is the general agency that administers the affairs and looks after the noncompetent Indians, and has nothing whatever to do with the commissioner's office, whose business it is to complete the rolls and the allotments and the disposition of the tribal properties.

The salaries at the Union Agency were $118,940, and the field force consisted of 72 persons, as follows: District agency force, 45; oil-field inspection, 3; land appraisers, 10; agricultural work, 12; salaries, $97,400. The Indian police numbered 35, and their salaries aggregated $9,000. The total number of employees December 27, 1912, was as follows: Office, 90; field, 57; Indian police, 25.

Now, I say to the gentleman that if he will figure up the total number of employees at these two offices he will find that the number is very far below 500.

Let us see what the commissioner has done during fiscal years 1911 and 1912—just a few of the things that he has done. During the fiscal year ended June 30, 1911, the commissioner sold 11,330 tracts of land, aggregating 630,237 acres, for $4,212,788, and collected on these lands of the purchase price $1,474,247. Those sales were made with the payments running along for one or two or three years, I think, and the gentlemen from Oklahoma, on account of the drought conditions prevailing down there, very properly secured legislation extending the time of payment—the time when this money should be paid—but necessitating, as everyone will see, a great amount of detail work in the computation of interest and the granting

of these extensions. For the fiscal year ended June 30, 1912, there were sold 5,099 tracts, aggregating 319,310 acres, for $2,038,023, and collected $1,323,068, and also $50,764 of interest on deferred payments.

The gentlemen from Oklahoma, also looking out for the best interests of their State, as they always do—and I commend them for it—secured legislation providing that the moneys belonging to these Indians should be deposited in local banks in Oklahoma. Gentlemen, think of depositing several million dollars in local banks throughout the State! Think of the work connected with the detail of ascertaining the standing of the banks and the arranging bonds and securities, and so forth, as is required under the regulations, and think of the amount of work that it adds to these officers! There had been deposited in 132 local banks in Oklahoma on June 30, 1912, $3,034,803 of tribal funds, upon which there was collected $52,500 in interest. On December 27 the deposits in local banks amounted to $3,442,506 in 163 banks.

The moneys that I have just referred to were deposited by the commissioner as tribal moneys. The Union Agency also had on deposit in 52 banks on June 30, 1912, Indian moneys aggregating $1,357,993, and the interest collected for the year ended June 30, 1912, amounted to $31,793.12.

Sixteen thousand four hundred and twenty-nine separate tracts have been sold, necessitating a ledger account for each tract, accounting for remittances received, looking after deferred payments, and computing interest thereon until final payments are made. As full payments are made deeds are issued. The lands being scattered and intermingled with allotted lands, computing interest on deferred payments and preparing, recording, and delivering deeds all require much detail work of an exact character.

Mr. Chairman, the Union agent has submitted a statement in which it appears that during the last fiscal year he actually handled over $10,000,000. I submit this is a big showing, and it must necessarily require that a large force be provided in order properly to safeguard and look out for the interests of these Indians.

Mr. Chairman, the district agents employed in the Five Civilized Tribes, according to the reports that have been made, show that they actually saved last year to the individual Indians in Oklahoma about $650,000, as I remember, in requiring guardians to account for moneys that were misappropriated, in obtaining adequate consideration for leases, and other things where the Indians had been defrauded; and in many other particulars, as I say, they actually saved last year about $650,000 and about $550,000 in the year before.

That the force of district agents is not adequate, and that they have not been able to protect these Indians as they should be protected, was made apparent by the Mott report which I brought to the attention of the House recently, showing the condition of guardianship matters in the Creek Nation, where it was shown that about $1,600,000 in the last three or four years had been expended in attorneys' fees, court costs, and guardianship fees in the administration of the affairs of the Indian minors in that particular portion of the Five Civilized Tribes at a cost of about 20 per cent of the amount handled.

It may be said, and I presume will be said, that the district agents have not been diligent or that condition would not have prevailed. It is an absolute impossibility for 10 or 12 district agents in an area as great as the State of Indiana, comprising a large number of counties, something like 60, if I am correct, to be present to look out for each one of these guardianship cases so as to see that the interests of the ward are being properly protected. I say in the utmost good faith that it will be a mistake to reduce this appropriation so that these district agents shall not be continued in the future.

Mr. FERRIS. Mr. Chairman, I shall consume only a moment of time. The burden of the complaint of the gentleman from South Dakota, as I understand it, is that the Oklahoma delegation and the Committee on Appropriations have reduced the amount of this appropriation for salaries to a degree that is dangerous. My reply is that of the 101,000 members of the Five Civilized Tribes, most of them are competent, well-educated people, so intermingled and intermarried with the whites that there is scarcely any Indian blood left. And to the end that we may not make any mistake about it, I want, if I may, in a moment or two, to analyze this appropriation of $150,000, and tell this committee what you can do with that amount in the way of employing clerks.

You can employ 1 chief, at $5,000 a year. You can employ 10 assistants, at $2,500 a year; 10 more assistants, at $2,000 a year; 50 clerks, at $1,500 a year; and 25 clerks, at $1,000 a year. That makes up the aggregate of $150,000.

Mr. BURKE of South Dakota. If the gentleman will permit me, is it not a fact that the salaries of the force to which the gentleman has just referred have been largely paid from moneys received by way of a charge for collecting moneys and from other sources.

Mr. FERRIS. I think that is partially true, and I think I may say at the same time that it is done in the face of the Atoka agreement. Nineteen years ago, when the Dawes Commission was established, they promised these people in a solemn treaty that they would not use their funds in administering upon their estates; but as time went along lax methods were acquired, and little items were squeezed into appropriation bills here and there which permitted them to take from the Indian funds money to hire a great quota of clerks. That appropriation and the personnel of those clerks have climbed in a way that no man can justify. The gentleman says he has a letter which states that there are only so many employees here and so many there; but I had on my desk and exhibited here in the general debate 21½ pages of names and salaries, this statement being furnished by the Indian office. There can not be any mythology or mysticism about that. I get my figures from the same source that the gentleman gets his, and I got that list of names and salaries from the Indian commissioner, who is as good an authority on that subject as I know of.

Mr. BURKE of South Dakota. May I interrupt the gentleman?

Mr. FERRIS. I am not going to get into any great colloquy about this. The gentleman has a well-defined idea that we ought to hire great quotas or droves of people to supervise the affairs of these Indians. I have a very well-defined idea that we ought to fire nearly every one of them out of there and let these Indians run their own business. I know that the gentleman will conjure figures. I do not mean to say that disrespectfully, but a man who wants to hold his job on a fat salary and with a liberal expense account—and there are 500 of them—can make remarkable figures and can come up here and get gentlemen to present them, which makes them appear very necessary.

Our delegation is very much in earnest about this matter, and we are acting in entire good faith. We believe we are right about it. We feel that the Indian people down there are practically bred out; that there is no longer any real Indian problem there among the great bulk of them. The people of the Five Civilized Tribes have maintained their own government for more than half a century. They have had legislatures and governors; they have passed laws. They have passed laws against intermarriage with negro tribes. They have passed laws on all sorts of propositions that white people would legislate upon. We have now Members of Congress and United States Senators. Our governor, our lieutenant governor, and the speaker of the Oklahoma Legislature are Indian citizens. I want to beg not only the Democrats here, but the Republicans, not to force upon us a lot of employees whom our people do not want. What we want is an end to this oversupervision down there. It has lasted too long already.

The answer to that, as these gentlemen will present it, is that we are trying to strip the State of Oklahoma of the necessary supervision that will keep these Indians from being robbed. That is only a plea to maintain their positions. Quite a startling set of figures was presented here a short time ago by the gentleman from South Dakota [Mr. BURKE] with reference to the expense of administering Indian estates in the probate courts of Oklahoma.

The CHAIRMAN. The time of the gentleman has expired.

Mr. BURKE of South Dakota. I ask unanimous consent that the time of the gentleman from Oklahoma be extended five minutes.

The CHAIRMAN. Unanimous consent is asked that the time of the gentleman from Oklahoma be extended five minutes. Is there objection?

There was no objection.

Mr. FERRIS. I have just one more observation I want to make. The gentleman from South Dakota [Mr. BURKE], I am sure, in entire good faith and as ably as it could be done, presented here a short time ago a matter with reference to the minor Indians in our State. I did not, at that time, have full information upon it, and I have not at this time. I can say to the House, though, and I want it to go into the RECORD, that our delegation has not remained silent and inactive about that matter. We have gone to the Interior Department and got these records that were referred to here. We have sent these to our governor. We have asked the governor of our State, and he has agreed to invoke the machinery of the State government, not only to prosecute, but to throw out of office every man who

can be found in any way to have mistreated an Indian ward. These figures charged in effect that the administration of Indian estates cost about 20 per cent, while the estates of white children cost about 1.7 per cent for administration.

That is an amazing statement. I can not believe it is true, for to so believe we must conclude the 40 cojudges and the coattorneys, the bar, are all crooked. I am sure such is not true. There is an answer to that. In most cases of the Five Civilized Tribes the Indian children have land, while the white children have none. That is not uniform, but it is almost. Why? Because up until the last few years they could not acquire title to land under any conditions. Up to seven or eight years ago you could not acquire title to a town lot, let alone agricultural land. So the estate was administered upon, almost in toto, for the Indians to hold the real estate, whereas the white estates were a little personal property which does not require any court proceeding or extended court costs.

Now, following that, 96 employees ought to be enough to administer upon a few full-blooded Indians that remain there. The gentleman will reply that the records of the Interior Department will show that there are 35,000 full-blooded Indians. Now, there was a time when it was slippery down there as to whether you should remain on the rolls or remain off the rolls. It was worth $8,000 or $10,000 if you remained on the rolls, and you lost everything if you went off the rolls. An unwritten law went around that if you went on the rolls as a full-blooded Indian you would never be rejected. The result was that a man with one-eighth or one-thirty-second Indian blood, if he could get some tribunal to put him on the rolls as a full-blooded Indian, would go on; and so he sits there with fifteen-sixteenths white blood in his veins—sits there as an incompetent Indian—whereas, as a matter of fact, he is able to hold a seat in Congress, a seat in the Senate, or be at the head of a banking institution, or a lawyer or a doctor, as many are.

Now, the real situation with regard to the Five Civilized Tribes is that the agency ought to be squeezed down to 25,000 or 30,000, an agency something like the Kiowa Agency, to administer on the full-bloods and to let the white Indians alone; and the sooner that can happen the better.

Mr. MANN. Will the gentleman yield for a question?

Mr. FERRIS. Certainly.

Mr. MANN. Did the gentleman happen to see a report made by one of the board of Indian commissioners in reference, not to the agency, but as to the condition of the Indians down there as to their ability to transact business?

Mr. FERRIS. I saw that in one of the papers.

Mr. MANN. I do not know how much of it was published in the paper; it is an official document, of course.

Mr. FERRIS. I did see it, and inasmuch as the gentleman alludes to it, and Members may not know what it was, I will say that it comes about in this way. This man the gentleman from Illinois refers to lives in Boston or Philadelphia?

Mr. MANN. I do not know where he lives.

Mr. FERRIS. I think he lives in Philadelphia.

Mr. MANN. All the Indians are not west of the Allegheny Mountains.

Mr. FERRIS. I know they are not; that is very true. I think this gentleman's name is Vaux. I have met Mr. Vaux; he is a delightful gentleman, a pleasant man, and undoubtedly has the best motives and intends to do good things for the Indians. I do not impugn his motive at all, but this is what happens: A man like Mr. Vaux will come from the East to Oklahoma. He wants to see some poor, old, pitiable Indian living out under a bark, and you can find whites worse off than they are; but he wants to see if he can not find some poor, old, ignorant Indian who does not know A from B, and through unfortunate circumstances is reduced to nothing. He finds him; he lives in a hovel, and the old Indian gets out in front of the hovel and pulls his hair down over his face so that he looks like an idiot, and the man gets out his camera and takes the picture, takes it back to New York and the New York Sun, or some other paper, writes up a beautiful story for the Sunday edition to go all over the East. People who know not of Indian questions think all Indians are alike, and that an agent should be detailed to transact all the business of these people, whether competent or incompetent. Such a large amount of supervision renders these Indians dependents and incompetents.

Mr. MILLER. Mr. Chairman, I move to strike out the last two words.

Mr. STEPHENS of Texas. Mr. Chairman, I ask unanimous consent that all debate close on this matter in five minutes.

Mr. MILLER. If the gentleman will pardon me, I want to read a paragraph or two which will take me more than five minutes.

Mr. STEPHENS of Texas. Then I will ask that all debate close on the matter in 10 minutes.

Mr. HARRISON of Mississippi. Mr. Chairman, does that carry with it the paragraph and amendments thereto?

Mr. STEPHENS of Texas. There is no amendment pending. I understand that we are discussing the item on a pro forma amendment made by the gentleman from South Dakota.

Mr. HARRISON of Mississippi. I shall object to that, because I desire to offer an amendment.

Mr. STEPHENS of Texas. I will yield to the gentleman to offer an amendment; I have no objection to that, and I ask unanimous consent that all debate be closed in 10 minutes on the paragraph.

Mr. BURKE of South Dakota. A parliamentary inquiry, Mr. Chairman.

The CHAIRMAN. The gentleman will state it.

Mr. BURKE of South Dakota. I anticipate that after this debate has closed it will not be out of order then, if unanimous consent is granted to close debate, to offer as an amendment an independent paragraph.

The CHAIRMAN. Unanimous consent is asked that debate on the paragraph shall expire at the end of 10 minutes. Is there objection?

There was no objection.

Mr. MILLER. Mr. Chairman, I understood when the gentleman made the request for unanimous consent that it was not intended that the time desired by the gentleman from Mississippi [Mr. HARRISON] should be taken from the 10 minutes requested. I will state that I may use about 7 minutes.

Mr. Chairman, this controversy respecting the proper method of handling the Five Civilized Tribes is a perennial one. It comes up at least once each year, and lately it has come up once each session. The reason it is perennial must be the fact that it is a difficult proposition. I do not think any Member of the House will question the patriotism, zeal, and ability of the gentlemen from Oklahoma, who are interested in and take an active part in this matter, although some of us may be inclined to differ with them in their conclusions, perhaps in some of the facts, which they state.

Personally I do feel a sympathy with their contention that we should withdraw supervision at the earliest practical time, but what is a practical time and a proper one to withdraw supervision is the distressing feature. I desire to call attention of the committee for a few moments to some work now being performed of a detailed nature at the agency in which are engaged many employees of whom criticism has been urged.

And as I take up this feature I wish to first call attention to the fact that we have had some bitter experiences in the State of Oklahoma, experiences that seem to recur even when we think they have passed away. There has been an attempt, and I think perhaps we can say a successful attempt, to blot out from history what is known as the Creek and Muskogee town-site matter, and yet we must look back upon that as a lesson to guide us in some of the deliberations of the present. I myself think that there is not a case in all Indian history, beginning with Christopher Columbus and coming down to now—and that is going some—that is as black and as bad as the town-site cases in the Creek Nation, about which we hear nothing now, because, as I have indicated, it is pretty nearly a closed chapter. With that lesson added to some of the others, particularly the guardianship and probate-court matters recently discussed by the gentleman from South Dakota [Mr. BURKE], some of us feel that there still remains a necessity on the part of the Government to extend its protection and care, and supervise some of the details, over some of the activities and property rights of these people.

Mr. FERRIS. Mr. Chairman, will the gentleman yield?

Mr. MILLER. Certainly.

Mr. FERRIS. Does not the gentleman think it would be a part of wisdom to draw the agency down to a proposition of handling the really incompetent Indians?

Mr. MILLER. Yes.

Mr. FERRIS. And let the money and property of the white Indians go?

Mr. MILLER. Yes.

Mr. FERRIS. Does not the gentleman think that $150,000, which provides for 96 employees, ought to be enough?

Mr. MILLER. If the gentleman will add enough to continue these district agents for another year, until the probate courts can get straightened around——

Mr. FERRIS. But does not the gentleman think that out of 96 employees 18 of them might serve as district agents, if they were so designated?

Mr. MILLER. Eighteen would be entirely inadequate for the work. This matter of the probate courts only came to public attention two years ago, when the committee, of which I happened to be a member, unearthed some things in the very presence of the gentleman from Oklahoma [Mr. FERRIS], who

cooperated with us in every respect, and who I am sure shared our views upon the subject. The probate courts of Oklahoma have not yet become straightened out—purified, as it were—and the public sentiment of the State has not yet been thoroughly aroused and not yet asserted itself in appropriate action, so that the affairs of a large part of the Indians will be honestly and justly handled without governmental supervision. Conditions are improving, but the complete change has not yet come to pass.

I think it is going to work out, but while it is working out I think we ought to still keep up these district agents for another year. However, that I did not intend to speak of. I wish to call the attention of the committee to some of the work that is being done by these agency employees. I have had many people speak to me about the destitution of the Indians in Oklahoma, assuming that they were poverty stricken. As a matter of fact, they are not. Muskogee, the second city in Oklahoma, is the center of a forest, not of oak, not of pine, but of oil wells. Looking abroad from the city you can see 5,000 great derricks. It is one of the most inspiring industrial sights ever unfolded to human gaze.

The CHAIRMAN (Mr. RODDENBERY). The time of the gentleman from Minnesota has expired.

Mr. MILLER. Mr. Chairman, I ask unanimous consent to proceed for five minutes more.

The CHAIRMAN. Is there objection?

There was no objection.

Mr. MILLER. This is but one of the great oil fields in Oklahoma. At Tulsa there is a greater one, and others might be named. Some of the work incident to the administering of the affairs of these Indians becomes apparent when you see the figures connected with handling these oil leases. Nearly all of these oil lands, it will be borne in mind, are Indian lands, owned by private Indians, whose affairs have to be superintended or they would be defrauded. I read now from the report of the commissioner:

> One of the greatest oil fields in the world has been developed in the area of the Five Tribes, largely under departmental leases. The production during the past few years has been approximately 40,000,000 barrels per annum. The Union Agency has handled up to the close of the past year 23,721 leases, mostly oil and gas, and on June 30, 1912, had 7,679 individual royalty ledger accounts, 413 restricted Cherokee equalization accounts, 967 land-sale accounts, with balance aggregating a total of $1,135,033.24, distributed in 52 banks located in almost every county in eastern Oklahoma. While this money is passing through the process of supervision the depositories are required to pay interest thereon, and during the year a total of $31,793.12 was collected as interest on these accounts and paid to the Indians. During the year just closed the total collections and total disbursements aggregated over $6,000,000. Including the amount received from the Treasury for transfer to individual accounts or disbursement and balances brought forward from previous year, the grand total of money handled for the fiscal year 1912 was $10,701,624.27. The accounting work is entirely handled in the agency office at Muskogee, the field force being relieved, as far as possible, of all clerical detail, so that they may give their entire time to investigations and the expeditious handling of applications and cases filed with them. The account for the year was made up of 28,786 remittance entries and 71,711 disbursement vouchers. There were 412,944 pieces of mail handled by the Muskogee office during the year.

The gentleman from Oklahoma says there is a large number of employees. It is a large job, it is a job of innumerable details, big in dollars, vast in detail, and if it is to be properly handled at all a requisite number of competent employees must be employed.

It is not simply a question of lands, either grazing or farming, but it is a great mineral field, cut up into small tracts, with vast numbers of leases. Many of the Indians are incompetent, and most of them require some supervision; and while this vast task remains in its present condition I for one feel that we should give to the service a reasonable sum to employ a reasonable number of employees. The gentleman seeks to cut the present appropriation. To-day there are employed at this agency 90 office men, 57 field men, and 25 Indian police. In addition there are 51 in the commissioner's office.

Mr. FERRIS rose.

Mr. MILLER. Oh, I know the gentleman has five hundred and something. I do not know the names that are there, but I have a certified statement from the agent himself, and I am sure the gentleman will admit that it is true.

Mr. FERRIS. I know the gentleman does not care to mislead. I hold in my hand here 21½ pages of a closely written document, giving the names, salaries, and officers, that was furnished to me by the Commissioner of Indian Affairs.

Mr. MILLER. Does it contain the teachers of all the schools down there?

Mr. FERRIS. Probably it does.

Mr. MILLER. I am sure that the gentleman in this controversy would not ask that those teachers be included?

Mr. FERRIS. I am not sure they are. If there are any included, there is but a small number of them.

Mr. MILLER. I do not think the number is very small, in view of the next paragraph in the bill, which calls for $300,000 for these schools.

Mr. FERRIS. I think it is.

Mr. CARTER. Mr. Chairman——

Mr. BURKE of South Dakota. Mr. Chairman, a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. BURKE of South Dakota. Has not the debate ended on the paragraph?

Mr. CARTER. I move to strike out the last two words, Mr. Chairman.

Mr. STEPHENS of Texas. There was an understanding that the debate was to close in 15 minutes.

The CHAIRMAN. The Chair understands that that request was presented, but withdrawn.

Mr. STEPHENS of Texas. Then I desire to renew the request that all debate on this paragraph be closed in two minutes.

The CHAIRMAN. The gentleman from Texas [Mr. STEPHENS] asks unanimous consent that all debate on the paragraph close in two minutes. Is there objection? [After a pause.] The Chair hears none.

Mr. STEPHENS of Texas. I yield to the gentleman from Oklahoma [Mr. CARTER].

Mr. CARTER. Mr. Chairman, I shall hardly need the two minutes. There has been repeatedly stated on the floor of this House the many wonderful things the famous Dawes Commission and the Union Agency have done in Oklahoma. The Dawes Commission came there in 1893 and this is 1913; it has operated for 20 years, and I dare say it has consumed from Federal Treasury and tribal funds combined not less than $1,000,000 per annum, which would aggregate $20,000,000, and which the gentleman must admit is out of all proportion to the amount of work accomplished. Much has also been said about the extravagance of probate courts in handling Indian probate matters, but I doubt very seriously if the percentage of cost in probate proceedings has equaled that consumed by the Indian Bureau in Oklahoma for the settlement of the tribal estate.

Mr. BURKE of South Dakota. Now, Mr. Chairman, as a new paragraph, after line 23, on page 22, I offer an amendment, that which I send to the Clerk's desk.

The CHAIRMAN. The Clerk will report the amendment.

The Clerk read as follows:

> For payment of salaries of employees and other expenses of advertisement and sale in connection with the disposition of unallotted lands and other tribal property belonging to any of the Five Civilized Tribes, to be paid from the proceeds of such sales when authorized by the Secretary of the Interior as provided by the act approved March 3, 1911, not exceeding $25,000, reimbursable from proceeds of sales.

Mr. STEPHENS of Texas. Mr. Chairman, I desire to make a point of order against the amendment. It is new legislation and is not germane to the paragraph in the bill.

The CHAIRMAN (Mr. SAUNDERS). The Chair will hear the gentleman from South Dakota [Mr. BURKE].

Mr. BURKE of South Dakota. Why, Mr. Chairman, there is not any question about it, if the Chair will look at the law. I did not suppose that anybody would make a point of order against the amendment. In 1911 the gentlemen from Oklahoma were solicitous that there be legislation permitting the deposit of money belonging to these Indians in the local banks in Oklahoma, and this act was passed. The net proceeds from the sales of surplus and unallotted lands and other tribal property, belonging to any of the Five Civilized Tribes, after deducting the necessary expense of advertising and sale, may be deposited in the national or State banks of Oklahoma, and so forth. The comptroller held that under that language they could not deduct from the proceeds the cost of sale, the advertising, and so forth, and that it was necessary to have this legislation in order to carry out the provisions of that act, and in the current appropriation act for this year, and also last year, this language was carried in order that the amount might be deducted as the act of 1911 contemplated.

The CHAIRMAN. Will the gentleman send up the law? Mooted questions like this depend entirely on the law which furnishes the authority. Does the gentleman from Texas [Mr. STEPHENS] desire to say anything on the point of order?

Mr. BURKE of South Dakota. It is identical with the current law, I will say to the gentleman.

Mr. STEPHENS of Texas. Identical with the language carried in the last bill?

Mr. BURKE of South Dakota. Just exactly.

Mr. STEPHENS of Texas. I do not think it would follow if it had been in the last bill it would be germane to this bill or would not be new legislation.

Mr. BURKE of South Dakota. Not at all.

Mr. STEPHENS of Texas. It might have been subject to the point of order last year, and the point might not have been made. I understand the point to be now that there is no law authorizing this to be paid out of Indian funds. That is surely subject to a point of order.

Mr. MANN. As I recall the item in the current law it has not a fixed amount at all.

Mr. BURKE of South Dakota. Not exceeding $25,000.

Mr. MANN. I think it says not exceeding 10 per cent of the receipts.

Mr. BURKE of South Dakota. That is another item.

Mr. CARTER. That is for the collection of rents.

Mr. BURKE of South Dakota. Twenty-five thousand dollars is to be deducted from the proceeds of the sale of unallotted lands—not exceeding $25,000; and I will say to the gentleman that the act of 1911, which provided that these moneys should be deposited in banks of Oklahoma, contemplated that the expenses incident to collecting them—the sale and property—should be deducted, because the law reads the net proceeds shall be deducted.

Mr. STEPHENS of Texas. Now, Mr. Chairman, I desire to read the amendment. I understand the amendment is in the exact language of the law of last year, and I maintain that the provision in that act itself was subject to a point of order. This is the language:

For payment of salaries of employees and other expenses of advertisement of sale in connection with the disposition of the unallotted lands and other tribal property belonging to any of the Five Civilized Tribes, to be paid from the proceeds of such sales when authorized by the Secretary of the Interior as provided by the act approved March 3, 1911, not exceeding $25,000, reimbursable from the proceeds of sale.

That, I think, makes it clearly subject to a point of order, because, as I understand it, there was no law before that which took from the Indians the money to make them reimburse these payments. If it had been in order for one year, then I will state that it would not have been in order for the next year, because these acts are only annual and run only for the terms covered by the acts.

Mr. FERRIS. And if the gentleman will permit, I may say, in addition to what the chairman has stated, that the appropriation of $25,000, reimbursable, was to do a specific task—that is, to sell the unallotted lands of the Five Civilized Tribes. They have sold the unallotted lands of the Five Civilized Tribes, and now they come in and offer an amendment, in identical language, to do the very thing that has already been done.

Mr. BURKE of South Dakota. Mr. Chairman, that has nothing to do with the point of order.

Mr. FERRIS. I think it has. I think if an appropriation is made to-day in this current bill to do a specific thing during the following fiscal year, and that thing is done, even though it be in order that year, it would not be in order in each succeeding year and indefinitely; and the fact that that was in order last year, to do a specific task that was done this year, does not make it in order in a succeeding year.

The CHAIRMAN. The Chair desires to ask a question of the gentleman from South Dakota [Mr. BURKE].

Mr. CARTER. Mr. Chairman——

The CHAIRMAN. The Chair will first recognize the gentleman from Oklahoma [Mr. CARTER].

Mr. CARTER. Mr. Chairman, practically this same question came up in the Sixty-first Congress. There was an item in the Indian appropriation bill as it came from the committee providing for the payment of certain matters out of Indian funds, such as this. A point of order was made against the provision by the gentleman from Oklahoma [Mr. DAVENPORT], and upon that point of order the paragraph was ruled out. I have been trying to get the text of the debate at that time, but have not succeeded as yet. I hope to have it in a few moments, and ask the Chair to reserve his ruling until we see what the record discloses.

The CHAIRMAN. The Chair desires to ask the gentleman from South Dakota a question. Of course, there is a question back of this of authority to make this payment. The Chair is referred to page 14, which seems to provide that the net receipts from the sale of the surplus of unallotted lands and other tribal property, after deducting the necessary expenses of advertisement and sale, and so forth, may be deposited in the national or State banks, and then follow certain provisions in relation to their disposition. Now, does the gentleman find in that authority to appropriate $25,000 for the payment of salaries of employees?

Mr. BURKE of South Dakota. Mr. Chairman, the $25,000, if I remember exactly the wording of the provision, is a mere limitation. The appropriation is that there shall be expended for the expenses of advertising, and so forth, in connection with the sale of unallotted lands, not exceeding $25,000; but I may be mistaken.

Mr. MANN. That is it; not exceeding $25,000.

Mr. BURKE of South Dakota. Mr. Chairman, if we have by law enacted legislation that we will do a certain thing, I presume that it is necessary to make an appropriation to execute the law. The only point that I can see in the point of order made by the gentleman would be that to deduct the expense from the proceeds is contrary to some existing treaty with the Indians.

Mr. CARTER. That is true, too.

Mr. BURKE of South Dakota. Mr. Chairman, there is absolutely no treaty and no agreement that requires the United States to go into the business of depositing money belonging to these Indians in the banks of Oklahoma and collecting interest thereon, and there is nothing in the law that contemplated that the United States would be selling lands, as land has been sold in Oklahoma, on time payments of 25 per cent annually, and a great many other things that we are doing in Oklahoma. And when that provision that the Chair now has before him was considered as finally enacted into law it was done after a careful examination of existing treaties and agreements with the Indians, and nothing could be found in conflict with our requiring of these Indians that they pay the expenses of this unusual business which we are carrying on for their benefit.

The gentlemen from Oklahoma are not only trying to drive out the district agents who supervise and look after the affairs of the individual restricted Indians, but they also propose to appropriate money from the Federal Treasury to pay the expense of administering laws that have been placed upon the statute books for the benefit of the people in Oklahoma, the local banks. For instance, the depositing of $5,000,000 or $4,000,000 in 200 banks and collecting the interest thereon is something of an undertaking. We are going to pay the interest to the Indians, and then the United States is going to pay the expense of the administration. I say to the gentleman that that is contrary of the policy that prevails, so far as the Committee on Indian Affairs is concerned, on both sides of the House, as to dealing with the Indians generally.

The CHAIRMAN. The amendment contemplates the payment of salaries of employees—the amendment at the desk.

Mr. BURKE of South Dakota. It says "necessary employees," does it not?

The CHAIRMAN. The word "necessary" is not used. It contemplates the payment of salaries. Now, are these employees necessary in connection with the advertisement and sale of these unallotted lands?

Mr. BURKE of South Dakota. Certainly.

The CHAIRMAN. But for this provision in the amendment, these officials would not be paid for services rendered in connection with the unallotted lands?

Mr. BURKE of South Dakota. Mr. Chairman, if I understand the position of the gentlemen from Oklahoma, it is that they will be paid out of the appropriation of $150,000 that is now used for other purposes largely.

The CHAIRMAN. Is that true as a matter of fact?

Mr. BURKE of South Dakota. I think it is.

Mr. FERRIS. These lands have been sold four times in the last four years. That is, they have been offered for sale. Every year they go around and offer them, but do not sell them. This year they sold nearly all of them, and there is no necessity for offering them again next year. That is the fact. I understand that goes to the merits, but the gentleman asked for information.

Mr. CARTER. They have so stated. The Commissioner of the Five Civilized Tribes stated publicly that there would be no more sales of these lands in the future.

Mr. BURKE of South Dakota. If the merits have any bearing upon the ruling of the Chair on the point of order——

Mr. CARTER. I was answering the gentleman's statement about the matter, that is all. I think it bears right on the point.

The CHAIRMAN. The Chair is simply trying to get at the facts. The principle is clear enough, but the difficulty is to get at the facts about the parliamentary situation.

Mr. CARTER. In the first session of the Sixtieth Congress the following paragraph was read:

For clerical work and labor connected with the leasing of Creek and Cherokee lands, for mineral and other purposes, and the leasing of lands of full-blood Indians under the act of April 26, 1906, $40,000: *Provided*, That the sum so expended shall be reimbursable out of the proceeds of such leases, and shall be equitably apportioned by the Secretary of the Interior from the moneys collected from such leases.

To that provision the following point of order was made:

Mr. DAVENPORT. Mr. Chairman, I make the point of order to the proviso beginning in line 23 and extending to the end of line 26 on the ground that it is new legislation and contains a change of existing law and the treaty with the tribes. I make it as to the entire proviso.

There was considerable discussion, covering several pages of the RECORD, after which the Chair finally ruled in the following manner:

Well, the Chair is ready to rule; and though he is very loath himself to so rule, yet, after consultation with a gentleman who is an excellent authority and who seems to be very clear, the Chair sustains the point of order.

Mr. BURKE of South Dakota. I will say to the gentleman from Oklahoma that at that time the act of 1911 had not been passed.

Mr. CARTER. The act of 1912 was only for 12 months, was it not?

Mr. BURKE of South Dakota. I am speaking of the paragraph in the Indian appropriation bill for 1911 which was general in its character and which provided that the net amount received from the sale of lands should be deposited in the local banks after deducting the expense of sale and advertising. Now, the gentleman from Oklahoma assisted in obtaining that legislation, and it was granted upon the representation that the expense of the sale and advertising would be deducted from the proceeds.

Mr. CARTER. My recollection is that that was an amendment to the Indian appropriation bill put on in the Senate and adopted in conference.

Mr. BURKE of South Dakota. No; it was inserted in the House.

The CHAIRMAN. Would the word "salaries" in the amendment be considered as being limited exclusively to compensation for work immediately connected with the sales, or would it have a broader application?

Mr. BURKE of South Dakota. I have not the item. I have sent to the desk the copy that I had.

The CHAIRMAN. The Chair is inclined to think that the authority of the act cited which provides for depositing in certain banks the net receipts from the sales of surplus and unallotted lands, less the necessary expense of advertising and sale, is hardly authority to support the amendment under consideration relating to the salaries of employees and other things. The Chair is not very well satisfied in his own mind about this ruling, because it is difficult for him to get at all the provisions of law back of the amendment, and which are supposed to justify it. On the whole, however, though with some hesitation, the Chair sustains the point of order.

Mr. BURKE of South Dakota. Mr. Chairman, I offer as another independent paragraph what I send to the Clerk's desk.

The CHAIRMAN. The gentleman from South Dakota offers an amendment, which the Clerk will report.

The Clerk read as follows:

Add as a separate paragraph, after line 23, the following:
"For expenses incident to and in connection with collection of rents of unallotted lands and tribal buildings such amount as may be necessary: *Provided*, That such an expenditure shall not exceed in the aggregate 10 per cent of the amount collected."

Mr. FERRIS. I reserve a point of order on that.

Mr. BURKE of South Dakota. Mr. Chairman, it is possible that this item is subject to a point of order. I will say, however, that it has been the law in two or three of the annual appropriation bills, including the one for the current fiscal year. As I have already stated, we are doing a very large amount of work in Oklahoma, and much that never was contemplated by the original treaty made with the Indians when we undertook to make a roll and to allot the lands.

The gentleman has stated that the unallotted lands have already been sold. I will state that there are at present 100,000 acres of unallotted lands undisposed of. There are 1,300,000 acres of timberlands that have not been disposed of. There are something like 20,000 accounts pending, where from 75 to 25 per cent of the purchase price which was to be paid for the unallotted lands, aggregating several million dollars, has not been collected. Evidently there must be an administrative force in the Five Civilized Tribes to attend to the details pertaining to the collection of this large amount of money; and, as I stated a while ago, owing to the diligence of our friends from Oklahoma, the time for the making of these payments was extended. The rate of interest is, I think, 6 per cent, and therefore every time there is a payment made there has to be a computation to ascertain the amount of interest. When payment is made finally then there has to be the proving, and the issuance of the deed, and a great amount of work in connection therewith.

I want to call the attention of the committee—and I am very glad gentlemen have made these points of order—to the fact that, so far as Oklahoma is concerned, the Federal Treasury will bear the expense of administering the affairs of the Indians. But in every other part of the country wherever it is possible to do so and wherever the Indians have any money, to say nothing of an estate that amounts to forty or sixty million dollars, in that State the expense of administering the affairs must be borne by the Federal Government.

I say it is inconsistent, and I am surprised that our friends from Oklahoma that have secured the things I have referred to when it was distinctly provided, that the expense of sale and collection at the time was to be deducted from the proceeds, that they now come in and raise the point of order in order that the money may be paid from the Treasury.

Mr. FERRIS. Will the gentleman yield?

Mr. BURKE of South Dakota. Yes.

Mr. FERRIS. If the gentleman will pardon me, I want to state some figures. Oklahoma has about 117,000 Indians within her borders. There are 300,000 Indians in the entire United States. There goes to Oklahoma $460,230; Arizona and New Mexico, $738,000; California, $21,250; Minnesota, $213,175; and to South Dakota, the gentleman's own State, $646,500, of which the two main items aggregate some $500,000, which are absolute gratuities.

Mr. BURKE of South Dakota. What is that statement—what did the gentleman say goes to South Dakota?

Mr. FERRIS. I say there are two items aggregating $507,000 that are gratuities by which the gentleman is bound by no treaties.

Mr. BURKE of South Dakota. Oh, the gentleman is not familiar with the treaties or he would not say that.

Mr. FERRIS. I think I am quite familiar with them. There goes to Oregon $233,736. Mr. Chairman, I will state that there has been so much muckraking by people who know not the facts in this matter that they are hard to understand. Our State maintains more than one-third of the Indians. We have been the dumping ground of the Indians in that State for the last 50 years, and to have people come here when items are reimbursable and make these statements is too much, and we can endure it no longer. Nearly two-thirds of the Indians in the United States are in our State, and the small sum of $460,000 goes to that State and most of it on the treaty items.

Mr. BURKE of South Dakota. The gentleman said a moment ago that most of the Indians in his State, or a good many of them, were holding public office, one was the governor, and very properly pointed to the fact that we have one of the civilized tribes, an honored and distinguished Member of this House, and from what the gentleman has heretofore said I am surprised that he would get up here and say that any money was necessary to be expended on the Indians in Oklahoma.

What I am pointing out, Mr. Chairman, is the fact that the Indians have a vast estate, that they have very large sums of money in the Treasury, and that we are doing in Oklahoma what was never contemplated when the agreement was made, and that there was no obligation on the part of the Government to do the things we are doing. We were not required to put money in the banks of Oklahoma and loan it out at 4, 5, and 6 per cent, as we are doing, and pay the interest to the Indians. We did not undertake to rent a lot of unallotted lands and collect hundreds of thousands of dollars' annual rent for the benefit of the Indians. There are a great many other things we do, and I am surprised that the gentleman should raise any question that the actual expenses of administering the matters should be deducted from the proceeds.

Mr. CARTER. Will the gentleman yield?

Mr. BURKE of South Dakota. Certainly. I want to say one thing more before the gentleman puts his question. The gentleman says that there has been $20,000,000 expended by the Dawes Commission. The gentleman knows, if he will stop to think, that no such sum of money has been expended by the Dawes Commission.

Mr. CARTER. I do not know it.

Mr. BURKE of South Dakota. The expense of enrolling and allotting to the members of the Five Civilized Tribes per capita is lower than the expense of allotment and enrollment of any other tribe of Indians in the United States. When the gentleman says that $20,000,000 has been expended he includes moneys that are expended for tribal expenses, moneys for education, and other things which the bill provides may be expended. He raises no question as to that, and instead of a million dollars there has been something like three or four hundred thousand dollars expended annually for administration purposes.

Mr. CARTER. If the gentleman from South Dakota [Mr. BURKE] does not know that a million dollars or more per annum was spent for several years in Oklahoma for purely administrative purposes, then he has not kept very close tab on the work of the Dawes Commission. To be sure, they may not have spent to exceed that amount per year for all these 20 years, but my statement was to the effect that my belief was that the expenses of maintaining this commission in its dilatory closing of tribal affairs would average about $1,000,000 per annum.

To be sure, a part of this may have been spent for schools, a part may have been spent for tribal officers, a part may have been spent for the sale of the unallotted lands, a part was spent for the sale of town sites and collection of tribal revenues, but all spent either for or by the officials under the direct supervision of the Indian Bureau. But, Mr. Chairman, I verily believe that if the gentleman from South Dakota [Mr. BURKE] would take the trouble to go over the records and analyze the different appropriations he would find that almost, if not quite, $20,000,000 has been used, exclusive of schools.

That, however, was not the question I had expected to address my remarks to. I wanted to discuss these treaty provisions in regard to Oklahoma about which the gentleman from South Dakota [Mr. BURKE] had much to say.

The gentleman lays great stress on the fact that our treaties did not provide for the Federal Government paying the expenses of the sales of land and the collection of rents, and because the treaties did not specifically set forth that these expenses should be paid by the Government he argues that the very statement providing for their doing carries with it an implied appropriation for the accomplishment of the work.

Let us see under what conditions these treaties were made. When the Dawes Commission came to Indian Territory it found the Five Civilized Tribes themselves with a regularly organized constitutional form of government, having officials for the performance of the many functions which the Department of the Interior has since arrogated to its own officials.

The making of the treaties provided for a change of conditions and for the winding up of tribal affairs. They provided for the making of the rolls, the allotments of land, and the sale of the town sites, and specifically set forth that these expenses should be borne by the Federal Government. They provided for the appraisement of land for allotment purposes, for the collection of the coal and asphalt royalties, and for the sale of the coal and asphalt lands, with a special provision that these expenses should be borne by the tribes. Nothing whatever was said as to who should bear the expenses for the sale of the unallotted lands, or for the collection of revenue from other than the coal and asphalt royalties. So I can not see by what distortion of construction the conclusion can be reached that there is an implied authorization in our treaties for the payment of these expenses out of tribal funds.

Mr. BURKE of South Dakota. I think the gentleman will admit that we have done a great many things in Oklahoma that were not contemplated at the time the treaty was made, and that the original agreement, the treaty, only contemplated that the Government would make enrollment and allotment of the land. That was the substance of what was contemplated?

Mr. CARTER. Oh, no; the sale of unallotted lands, sale of town sites, collection of coal and asphalt royalties, sale of mineral lands, tribal buildings, and all these other things were provided for by the treaties.

Mr. BURKE of South Dakota. But we have done a great many things that the treaty did not contemplate.

Mr. CARTER. Yes; that is true; but that does not relieve us of the responsibility of our obligations.

Mr. BURKE of South Dakota. And for the benefit and advantage of the Indians.

The CHAIRMAN. Does the gentleman insist upon the point of order?

Mr. FERRIS. Mr. Chairman, I make the point of order.

The CHAIRMAN. The point of order is sustained.

Mr. HARRISON of Mississippi. Mr. Chairman, I offer as a new paragraph the following amendment, to be inserted at the end of line 23.

The Clerk read as follows:

Add, after line 23, page 22, as a new paragraph, the following:

"That the Secretary of the Interior is hereby directed to receive, at any time within six months after the passage of this act, the application of any person for enrollment to the rights of a citizen and member of the Choctaw-Chickasaw Tribe of Indians claiming an interest in the lands and funds of the Choctaw-Chickasaw Tribe by reason of being a descendant of a member of the Choctaw Tribe who received, or was entitled to receive, lands under the terms of article 14 of the treaty of Dancing Rabbit Creek under date of September 27, 1830.

"That the Secretary of the Interior shall be vested with the power to determine the rights of said claimants upon such evidence as may be produced by the applicant, without regard to any judgment or decision heretofore rendered by any court or commission to the Five Civilized Tribes or the Department of the Interior, and without regard to any condition or disability heretofore imposed by any act of Congress: *Provided*, That any relevant evidence admissible either in actions at law or in equity in the courts of the United States shall be received by the Secretary of the Interior as evidence in determining the rights of said applicants: *Provided further*, That any testimony received as evidence and appearing in the record in the case of the Choctaw Nation *v.* The United States, No. 12442, in the Court of Claims, and decided in the United States Supreme Court on November 15, 1886, may, if relevant, be received in evidence.

"That all applicants under this act may be represented by such attorneys as each individual may select, and the fee of such attorney may be fixed in accordance with any contract now or hereafter made between said applicant and said attorney, and that such contract shall govern the amount of such fee: *Provided*, That the Secretary of the Interior may limit the percentage of compensation in each case, and that the said contract shall be enforcible for no greater sum than that which may be fixed by the Secretary of the Interior.

"That the Secretary of the Interior shall have prepared and made a schedule or roll of all persons entitled under the provisions of this act, within eight months after its passage, and shall, within said eight months, award them the full rights of citizens and members of the Choctaw-Chickasaw Tribe: *Provided*, That those enrolled under this act shall not be entitled to nor receive any part of the Choctaw annuities existing as of the date of September 27, 1830.

"That in the event there shall not be sufficient land to make allotments to such persons as may be enrolled under this act to equalize them with the allotments heretofore granted to those already upon the rolls of said tribe, there shall be placed to the credit of each person who does not receive allotments, and paid to such person a sum of money equal to double the appraised value of 320 acres of the average allotable land of the Choctaw-Chickasaw Tribe, according to the relative appraisement heretofore made, in lieu of said allotments of land.

"That there shall be paid to each person who enrolls under the provisions of this act such a sum of money out of the funds of the tribe as will equalize said person with the persons now upon the rolls for all distributions of money made to citizens and members of said joint tribe since 1893: *Provided*, That those enrolled under the provisions of this act shall not be entitled to nor receive any part of the Choctaw annuity existing under date of September 27, 1830, aforesaid: *Provided further*, That this act shall not apply to persons born since March 4, 1907.

"That applications for minors may be made by either parent, or if neither parent is living, by guardian. Applications for insane persons, or those confined in other public institutions, may be made by curators. Depositions may be taken in support of said applications in any place in the United States upon notice to theAttorney General and the Secretary of the Interior, and the procedure as to notice and taking of depositions shall be as in ordinary cases before the United States courts. The expense of taking depositions on the part of claimants shall be paid by the applicants in the first instance, but shall be taxed as costs in each case where the applicant is successful, and said costs shall be charged to the funds of said tribe in the United States Treasury.

"That the rights of all persons claiming citizenship or any rights in the Choctaw-Chickasaw Tribe, under or by reason of the treaty of 1830, who fail to make application to the Secretary of the Interior, under this act, within six months after the passage of this act shall be forever barred.

"That the tribal organization in the Choctaw-Chickasaw Tribe is hereby abolished, and the title to all tribal lands and moneys yet undistributed are declared to be vested in the United States, as trustee for those entitled to the same under the laws and treaties of the United States; and such moneys as may come into the Treasury of the United States as trustee for said tribe, or which are now held by the United States as trustee for said tribe, shall not be distributed among the members of said tribe within eight months after the passage of this act."

Mr. STEPHENS of Texas (interrupting the reading). Mr. Chairman, for the purpose of saving time, I now make the point of order against the amendment. I am quite willing that the amendment shall be inserted into the record.

Mr. HARRISON of Mississippi. Mr. Chairman, I hope the gentleman will reserve this point of order.

The CHAIRMAN. Does the gentleman from Texas make the point of order?

Mr. STEPHENS of Texas. Mr. Chairman, I yield to the gentleman from Oklahoma [Mr. CARTER].

Mr. CARTER. Mr. Chairman, I had expected to make the point of order as soon as the reading of the amendment was finished. If the gentleman from Mississippi desires to proceed, however, I shall reserve the point of order.

Mr. HARRISON of Mississippi. Mr. Chairman, I concede the point of order, if insisted upon, to be well taken. I was in hopes that the gentleman's high sense of justice and fairness would control him in this matter and that he would allow the amendment to be voted upon.

Mr. CARTER. Mr. Chairman, I thank the gentleman very much for his compliment, but my high sense of justice and fairness compels me to make the point of order.

The CHAIRMAN. The point of order is sustained.

The Clerk read as follows:

The sum of $300,000, to be expended in the discretion of the Secretary of the Interior, under rules and regulations to be prescribed by him, in aid of the common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations in Oklahoma, during the fiscal year ending June 30, 1914: *Provided*, That this appropriation shall not be subject to the limitation in section 1 of this act limiting the expenditure of money to educate children of less than one-fourth Indian blood.

Mr. FOWLER. Mr. Chairman, I desire to reserve a point of order to this paragraph.

Mr. MANN. Mr. Chairman, I think the gentleman may as well make the point of order.

Mr. CARTER. Mr. Chairman, I hope the gentleman will not make the point of order.

Mr. FOWLER. Mr. Chairman, I will reserve the point of order for the time being, unless my colleague, the gentleman from Illinois [Mr. MANN], desires to make the point of order.

Mr. MANN. I supposed that the desire was to get through with this bill to-night.

Mr. CARTER. Mr. Chairman, I merely want about 15 minutes to discuss this matter.

Mr. STEPHENS of Texas. Mr. Chairman, I would like to have some time fixed when we shall close debate upon this section. I therefore move——

Mr. MANN. Oh, the gentleman can not move to close debate when a point of order is pending. The gentleman from Oklahoma, I understand, desires 15 minutes.

Mr. STEPHENS of Texas. Mr. Chairman, I do not think it is a very good way to expedite business here to permit points of order to be discussed for so long a time.

The CHAIRMAN. It is within the province of any Member to call for the ruling at any time.

Mr. CARTER. Mr. Chairman, I have so far not taken up very much of the time of the committee. This is an important provision to my State, and I would like to have at least 15 minutes in which to discuss it.

The CHAIRMAN. Does the gentleman from Oklahoma make that request.

Mr. CARTER. Mr. Chairman, I ask unanimous consent to proceed for 15 minutes.

The CHAIRMAN. The gentleman from Oklahoma asks unanimous consent to proceed for 15 minutes. Is there objection?

There was no objection.

Mr. CARTER. Mr. Chairman, I believe I measure my words with conservatism and deliberation when I say that never was a State brought into this Union under such unfavorable conditions from the standpoint of financial responsibility and meager tax values as the struggling new Commonwealth which I have the honor in part to represent.

I ask this committee to bear with me in patience, for I bring a message from more than 300,000 helpless, innocent, ambitious American children—American children, let me repeat; blood of your blood and bone of your bone—and they represent the offspring of as noble and worthy pioneers as have ever gone into the wilderness and hewn an empire from the primeval forests of America.

The State of Oklahoma, as most of you know, was made up of what might be called two separate and distinct dependencies—old Oklahoma and Indian Territory—each about equal in area, Indian Territory, the eastern half of the State, consisting of a little less than 20,000,000 acres, and Oklahoma, the western half, exceeding that acreage by a small figure. The population of the State was 1,470,000 shortly before admission, about 120,000 of these being American Indians.

I speak to you to-day in behalf of the eastern half or Indian Territory side of the State.

Indian Territory was really a misnomer, for it was never in fact a Territory. It had no real form of government, no executive or legislative tribunals whatever save the parent Government at Washington. In fact, our only semblance of any form of organized government was the Federal courts which had been established for several years. We had no schools for the white child, no schoolhouses, no improved roads, no bridges, no courthouses, no jails—in fact, no improvements of any public character whatever. So the financial responsibility which Congress imposed upon the people of the eastern half of Oklahoma was that of building a Commonwealth for the more than 700,000 people who inhabited the Indian Territory side of the State, and building it from the grass roots without any digested plans and specifications and without sufficient material, as I will attempt to show.

Now, let us invoice the resources you placed at our command for the accomplishment of this Herculean task; let us see what tools you gave us to work with.

I have told you that the million and a half population of our State included 120,000 Indians, which is more than one-third of all the Indian population of the United States. One hundred and one thousand of these Indians lived on the eastern side, and comprise the Five Civilized Tribes.

Every foot of the 20,000,000 acres of land on the eastern side of Oklahoma, save a few thousand acres of town site, was owned by these Five Civilized Tribes. By the Atoka agreement, approved by Congress on June 28, 1898, and supplemental agreement of July 1, 1902, and other treaties of contemporaneous dates, the Indians of the Five Civilized Tribes had been guaranteed by the Federal Government that none of these lands should become taxable, under various reservations, as follows: Some were made nontaxable for 21 years, or as long as the title to same remained in the original allottee, others for 21 years without conditions, while still others were exempted from taxation in perpetuity regardless of transfer or alienation.

Now, if this was the end of the record and Oklahoma had accepted statehood in the full knowledge of these facts, then we might not now with good grace and in good faith come back to the parent Government and ask even this small modicum of relief.

But this is by no means the end of the story. The enabling act under which Oklahoma became a State was passed, as I remember, by the first session of the Fifty-ninth Congress. But along about the same time—on April 26, 1906—there was passed by Congress what was commonly known as the Curtis Act, entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes." This act provided for the taxation of the lands of the Five Civilized Tribes upon certain conditions. The provision dealing with this subject is found in the proviso at the end of secton 19 in the following language:

Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation so long as the title remains in the original allottee.

This Federal statute, providing for the taxation of the lands of the Five Civilized Tribes, had been on the statute books for more than 18 months when our constitution was adopted, and every man who thought of the matter of taxation at all when he voted on the constitution felt confident that this act of Congress making these lands taxable, and passed almost two years before statehood, was the law of the land and would prevail.

In accordance with this belief, when the Oklahoma delegation came to Congress, Congress was placed in full information of our deplorable condition and prevailed upon to remove restrictions on about one-half of this 20,000,000 acres of land in order that we might have sufficient taxable values to build up our State institutions and maintain our State government, and our State proceeded with the collection of the taxes.

Since it appeared that we would have sufficient taxable property on the eastern side of our State to maintain our State government and justify the building of necessary State institutions, our people proceeded to float bonds for the building of county courthouses, county jails, public schools, public roads, bridges, and other internal improvements. These bonds have already been issued, are now outstanding, and payment both as to interest and principal must be met in some manner or the credit of the eastern side of the State becomes utterly worthless.

But the Indian of the Five Civilized Tribes showed that he is not so much of an incompetent as some of our friends here would have you believe. Poor Lo emulated the example of his paleface brother. He proceeded to make perfectly good as a full-fledged American citizen by resisting the taxation of his property. These Indians simply asserted the right of nontaxation of their lands, guaranteed to them by their several agreements, by suing out an injunction against the tax officials of Oklahoma. These suits came up through the regular channels of our judiciary to the Supreme Court of the United States, and this high court rendered a decision to the effect that the several agreements made with the Indians were the result of mutual considerations and concessions on both sides, and that thereby the guaranty of nontaxation of Indian lands had come to be a vested right, sufficient to exempt same from taxation, and that those provisions of the acts of April 26, 1906, and May 27, 1908, seeking to make these lands taxable were null and void, thereby leaving the entire east side of our State high and dry, bereft completely of any taxable values, so far as land is concerned.

To make a long story short, you have imposed upon the people of Oklahoma the responsibility of building an empire, and have taken from them the material and tools with which to construct it. You brought us into statehood under a written contract that all Indian lands would be taxable, as long as restrictions were removed, but the courts now hold that these lands can not be taxed, even if the restrictions are removed.

Gentlemen may contend that other States having Indian lands do not receive such gratuities from Congress, but we answer that their cases are not parallel with ours. I repeat, no State in this Union labors under such tax-exemption handicaps as the State of Oklahoma; no other State in this Union has practically one-half of its land area exempt from taxtion; no other State in the Union has over 80 per cent of the land values of the majority of its counties withdrawn from the tax rolls.

And here is another very important distinction: In all other States Indian lands become taxable as soon as the restrictions are removed, but the lands of the Five Civilized Tribes do not. Some of them do not become taxable until sold, and others will never become taxable under any kind of circumstances whatever.

It is true that a small portion of these lands has been sold, but I doubt if the combined sales of both allotted and unallotted lands during the 14 years in which the Dawes Commission has been attempting to settle our affairs will aggregate as much as 4,000,000 acres, and some of that is still nontaxable. This

would leave no less than 16,000,000 acres, not less than 80 per cent of all of 40 counties on the east side of the State, nontaxable.

These 16,000,000 acres consist of agricultural, coal, oil, gas, and grazing lands, and their aggregate valuation would probably reach $500,000,000, all of which is withdrawn from taxation.

Now, gentlemen of the committee, ours is a young State, with not so much personal property and valuable improvements as older States; so, like all new countries, our lands represent the principal assets of any value.

I would not undertake offhand to say the specific proportion of values this $500,000,000 worth of property really represents, but it is a stupendous amount to be withdrawn from the taxation of any State, and I dare say would seriously cripple the taxable values even of as wealthy a State as that which the distinguished gentleman reserving this point of order so ably represents on this floor. So I appeal to the good judgment of the gentleman. I implore the gentlemen of this committee not to inflict longer this unjust burden upon our people. Especially do I beseech the gentleman from Illinois [Mr. FOWLER], who honors one of the wealthiest States of this Union by his presence here, to call to his aid all his powers of generosity and graciousness, to muster his full measure of the milk of human kindness, and do simple justice to a struggling young sister State of this Republic by withdrawing his point of order and granting this small modicum of relief.

Mr. FOWLER. Mr. Chairman, will the gentleman yield for a question?

Mr. CARTER. Certainly.

Mr. FOWLER. Is this not the second attempt to appropriate $300,000 for this purpose? I mean by that, was not the last bill the first time that this sum was carried for the purpose provided in the bill?

Mr. CARTER. Oh, no; the first time that this amount was carried in the bill was in 1904.

Mr. FOWLER. Has it been carried since 1904?

Mr. CARTER. It was carried right along until 1910, the first session of the Sixty-first Congress, and was then dropped. It was dropped at that time because we supposed that these lands would become taxable under the acts of April 26, 1906, and May 27, 1908. That appropriation was dropped prior to the time of the decision of the Supreme Court setting forth that the lands would not become taxable, even when restrictions were removed.

Mr. FOWLER. Is there no provision whatever for the education of these Indians other than this $300,000?

Mr. CARTER. The Indians have some separate schools, Mr. Chairman, at which about probably one-fourth of their scholastic population is being educated; not quite one-fourth, I would judge.

Mr. FOWLER. Is this sum intended to take care of the three-fourths?

Mr. CARTER. This sum, as indicated by the paragraph, is intended to take the place of the money that the State has been deprived of by the nontaxation of these 16,000,000 acres of Indian lands in Oklahoma; and I will say further to the gentleman that the Indian child has the same school privilege in Oklahoma as any other person, because he is a full-fledged citizen of the United States and of the State of Oklahoma.

Mr. FOWLER. Do they not have free schools there the same as the whites?

Mr. CARTER. We have, but we are not able to maintain them at some places for a very great length of time during the year on account of our meager taxable assets.

Mr. FOWLER. How long do you maintain the free-school system?

Mr. CARTER. We maintain them in the country districts, I would say, from three to seven months.

Mr. FULLER. On an average of how many months?

Mr. CARTER. Of course, the gentleman is getting me into pretty deep water now. I would not like to attempt a statement like that offhand without making some figures. In some neighborhoods we have been practically unable to operate schools except by these funds provided by this paragraph, and then we have been able to run them only from three to five months.

Mr. FOWLER. Is it not a fact that in many States of the Union there are counties which do not run the schools for the whites more than five or six months in a year?

Mr. CARTER. Without this appropriation I doubt if we would be able to run three months in some of our school districts.

Mr. FOWLER. Is this intended to extend the free school system over the three or four months that you say?

Mr. CARTER. Oh, yes; that is what it is used for.

Mr. FOWLER. To pay teachers and to provide for the extension of the schools?

Mr. CARTER. That is the purpose.

Mr. FOWLER. How long will it give these Indians a school per annum? How many months?

Mr. CARTER. Again, I would not say, specifically, as to that. It is a very small amount, but it would at least extend the schools two or three months where we are short on taxable values.

Mr. FOWLER. Do you think this sum ought to go out of this bill?

Mr. CARTER. I certainly do not.

The CHAIRMAN. The time of the gentleman from Oklahoma [Mr. CARTER] has expired.

Mr. MILLER. Mr. Chairman, I ask unanimous consent that his time be extended one minute.

The CHAIRMAN. Is there objection?

There was no objection.

Mr. MILLER. How much did the department estimate?

Mr. CARTER. My eyes do not fall on the figures right now, but I think it was $300,000.

Mr. MILLER. I am quite sure the gentleman is mistaken. I do not think the department estimate is that at all. I do not find it at all.

Mr. CARTER. I have two estimates in my hands.

Mr. MILLER. I beg the gentleman's pardon, but I think they are letters.

Mr. CARTER. They are letters—justifications.

Mr. MILLER. This is not estimated for by the department.

Mr. CARTER. It is not estimated for. It was not estimated for to begin with, but it was justified by the department since then and before it was favorably acted on by the committee.

Mr. MANN. The estimate came from the Secretary of the Treasury?

Mr. CARTER. This is a letter from the Secretary of the Interior.

Mr. MILLER. The purpose of my inquiry is to ascertain if this expenditure was an item in a comprehensive scheme of education in Oklahoma and was in the department's estimate. I have not been able to find any estimate.

Mr. CARTER. I think the department worked it out pretty thoroughly in 1904, when it was first put in the bill.

The CHAIRMAN. The time of the gentleman from Oklahoma [Mr. CARTER] has expired.

Mr. STEPHENS of Texas. Mr. Chairman, I ask unanimous consent that the gentleman have two minutes more.

The CHAIRMAN. Is there objection? [After a pause.] The Chair hears none.

Mr. CARTER. In 1904 this matter came up from the department, and I think extended hearings were had before the Committee on Indian Affairs, but I am informed by the gentleman from Texas [Mr. STEPHENS] that no record was kept of those hearings. I have searched very diligently for them and have not been able to find them. In 1905, 1906, 1907, 1908, and 1909 it was estimated for. And at the next session, I think, although I will not be sure about that, the gentleman from South Dakota [Mr. BURKE] was then chairman of the Committee on Indian Affairs and can tell whether there was an estimate. And his bill carried $75,000, although in different language from that which had been used in the past. At that time it was supposed that the Indian lands would become taxable as soon as restrictions were removed or, at the most, when sold, but since then the Supreme Court has held that some of the lands would not become taxable when restrictions were removed and others would not be taxable even when transferred—nontaxable in perpetuity. We thought last year it would be necessary—in fact, we found it extremely necessary—to restore the item of $300,000, so it was done in the Senate and was agreed to in conference.

Mr. MILLER. As I understand here, the trouble is not an act of poverty or wealth on the part of the Indian in that locality sufficient to support the school? Simply, it is not subject to the taxation?

Mr. CARTER. Yes.

Mr. MILLER. What is the gentleman's view of this being reimbursable?

Mr. CARTER. That, it seems to me, would simply get back to the treaty provision. The Supreme Court has decided that the Indians should not have their lands made subject to taxation, and this might be in violation of that decision of the Supreme Court. I would say to the gentleman I would be very glad, indeed, that, so far as I am concerned and my family is concerned, all the taxes on my allotment have been paid, in spite of the law.

Mr. MILLER. Which shows good public spirit.

Mr. CARTER. While I do feel deeply the need of these taxes for the State. I make no especial claim to public spirit.

The CHAIRMAN. The time of the gentleman has again expired.

Mr. MANN. Mr. Chairman, may I ask the gentleman when the item was included in the appropriation bill, as he states, in 1904, whether that is the same item that is in this bill?

Mr. CARTER. Not exactly.

Mr. MANN. That is what I thought. In what respect do they differ?

Mr. CARTER. I think there is practically no difference in their meaning.

Mr. MANN. Well, it is a matter of opinion as to what they mean.

Mr. CARTER. I have the original provision on my desk. If the gentleman means to say that the act of 1904 did not contemplate the education of white children, then I say there is absolutely no difference, because that is what is specifically set forth.

Mr. MANN. Well, that was at a time when the State of Oklahoma was the Territory of Oklahoma. Oklahoma was admitted in 1907. Was the item omitted in 1908?

Mr. STEPHENS of Texas. This was known as the Five Tribes. The western part of the State of Oklahoma was not Territory.

Mr. MANN. I did not say anything about that. Was Oklahoma admitted as a State in 1907?

Mr. STEPHENS of Texas. That is right.

Mr. FERRIS. This item was cut to $150,000 on the motion of the Members from Oklahoma. We said if you will remove the restrictions we will not ask for any more school removals. Congress came to the rescue by the passage of the act of 1908, which was the removal-restriction act. The Supreme Court came along last winter and said that even though Congress decided these lands were taxable, they were not.

Mr. MANN. I do not always get the information I ask for, but I sometimes get very valuable information.

Now, in 1904 this was the Indian Territory.

Mr. CARTER. Yes, sir.

Mr. MANN. In 1905 it was the Indian Territory.

Mr. CARTER. Yes.

Mr. MANN. In 1906 it was the Indian Territory. In 1907 it was the Indian Territory.

Mr. FERRIS. It was a State in the fall.

Mr. MANN. The Government provided for the schools then. In 1908 it was the State of Oklahoma. We did not insert the item in the bill.

Mr. FERRIS. We did.

Mr. CARTER. Oh, yes; we did.

Mr. MANN. The gentleman stated a while ago that we did not.

Mr. CARTER. The gentleman is mistaken. Here is the provision:

> For the maintenance, strengthening, and enlarging of the tribal schools of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations, and making provision for the attendance of children of parents of other than Indian blood therein, and the establishment of new schools under the control of the Department of the Interior, the sum of $300,000, or so much thereof as may be necessary, to be placed in the hands of the Secretary of the Interior and disbursed by him under such rules and regulations as he may prescribe.

Mr. MANN. If the gentleman wants to insert an item of that kind in the bill, that is a different proposition. That is entirely different from this proposition. Here is an item of $300,000 for the common schools of Oklahoma. There was an item——

Mr. CARTER. For the same thing——

Mr. MANN. To provide money for the tribal schools of these Indians who were living in tribal relations.

Mr. CARTER. And also making provision for the attendance of children of parents of other than Indian blood.

Mr. MANN. While Oklahoma was a Territory we were providing schools there, but we are not under any obligation to provide schools in the State of Oklahoma.

Now, if the gentleman will pardon me, I appreciate the conditions there. I can see that the conditions are onerous. But, on the one hand, the gentleman comes into the House and insists, in violation, as I think, of the compact made in the House in reference to the deposit of money in the Oklahoma banks, that the Government shall pay the expenses of collection and that the Government shall pay the expense of salaries in order to save the Indians' money, and, on the other hand, says that because we can not collect taxes from the Indians the Government ought to maintain the schools. The Government gets it at both ends and in the middle.

If the money is needed for the maintenance of the common schools and you can not tax the Indian lands, why does the gentleman propose to reimburse it out of Indian funds?

Mr. CARTER. Let me ask the gentleman a question, as a lawyer?

Mr. MANN. Oh, the gentleman need not ask me any question as a lawyer. I quit the practice of law some time ago, and I never answer a question of law without a retainer. [Laughter.]

Mr. CARTER. Not being a lawyer myself, Mr. Chairman, I am simply seeking legal advice from a distinguished legal light. I wanted to ask the gentleman, if, in view of the Supreme Court decision which sets forth that these Indians should not pay taxes on their lands, would such an act passed by this Congress be considered of sufficient validity to warrant the payment of the funds in lieu of taxes?

Mr. MANN. Oh, I should think that the court decision would not affect the matter one way or the other. The decision of the court was that the State of Oklahoma could not tax these lands. Whether the treaty is so drawn that the Government could make a fund reimbursable I do not undertake to say. But the decision of the Supreme Court has nothing to do with the question.

Mr. CARTER. That would be doing indirectly what you can not do directly.

Mr. MANN. That is what you want to do. You want to do that indirectly what you can not do directly.

The CHAIRMAN. The Chair will hear the gentleman from Illinois [Mr. FOWLER] on a point of order.

Mr. FOWLER. Mr. Chairman, I am unalterably opposed to the United States appropriating money out of the National Treasury for the common schools of any State of the Union unless such a condition arises which might be termed an emergency. I can see that such a condition might arise. It appears to me that in this case, Mr. Chairman, these Indians have been receiving practically this sum of money for quite a number of years for the purpose of maintaining common schools; not under the name of "common schools" up to 1908, but as tribal schools. I feel somewhat inclined to believe, Mr. Chairman, that if the committee will agree to make the sum $200,000, I will withdraw the point of order. I ask that the sum be made $200,000 until further arrangements can be made for the extension of these schools. If the gentlemen who are in charge of the bill will agree to that, I will withdraw my point of order.

Mr. CARTER. Mr. Chairman, I would be very glad to do that if the gentleman can give me assurance that the point of order will not be made by some one else.

Mr. FOWLER. If I can get that understanding I will withdraw the point of order. I do not believe that there ought to be $300,000 appropriated under the circumstances. Oklahoma is one of the greatest States of this Union, and for her to come into the Halls of Congress and ask that the aid, the strong arm of this Government, be extended to maintain her free schools does seem to me, Mr. Chairman, a reflection upon that great State.

The CHAIRMAN. What does the gentleman from Illinois [Mr. FOWLER] do with his point of order?

Mr. CARTER. I will compromise with the gentleman.

Mr. MANN. Does the gentleman withdraw the point of order?

Mr. FOWLER. I withdraw the point of order on that understanding.

Mr. MANN. Then I make the point of order, Mr. Chairman.

The CHAIRMAN. The point of order is sustained.

The Chair will now dispose of a point of order made earlier in the day to an amendment sent up by the gentleman from Montana [Mr. PRAY]. This matter could not be ruled on at the time because there were quite a number of statutes and sections of statutes that had to be examined in order to ascertain the foundation upon which the amendment was supposed to rest. The first clause in the amendment provides for a survey of the lands of the Tongue River and Cheyenne River Indian Reservations. Now of course to justify the appropriation for this purpose there must be some authority conferred somewhere by some law. The gentleman from Montana [Mr. PRAY] sent up the following statute as supposedly furnishing authority for this particular appropriation. Leaving out intermediate matter, the statute is as follows:

> That in all cases * * * the President of the United States, whenever in his opinion any reservation or any part thereof is advantageous for agricultural and grazing purposes, may cause such reservation to be surveyed.

This is a provision under which discretion is given to the President of the United States to have a survey made of any reservation. Under the amendment a department is authorized to make a survey of a particular reservation. The Chair is unable to see how authority that is given to the President to be exercised at his discretion furnishes authority for an amendment empowering a department to make a survey without regard to the wishes, judgment, or discretion of the President. Hence it seems to the Chair that the point of order to this portion of the amendment is certainly well taken. Under very familiar and abundant precedent, the point of order to the amendment being good as to a portion of the same, it is good as to the whole amendment. The point of order is therefore sustained.

The Clerk read as follows:

That the act of Congress approved February 19, 1912 (Public, No. 91), being "An act to provide for the sale of the surface of the coal and asphalt lands of the Choctaw and Chickasaw Nations, and for other purposes" and the paragraph amendatory to such act contained in the act of Congress approved August 24, 1912 (Public, No. 335), entitled "An act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, etc.," be, and the same are hereby, amended so as to provide that the classification and appraisement of such lands shall be completed by John G. Joyce, chief surveyor, not later than four months after the passage of this act.

Mr. MANN. I make a point of order against the paragraph read.

Mr. STEPHENS of Texas. I hope the gentleman will reserve his point of order for the purpose of allowing an amendment to be offered to perfect the section.

Mr. MANN. I will reserve the point of order, but it is not possible to reserve it for the purpose of perfecting the section.

Mr. STEPHENS of Texas. It is the common usage to do that.

Mr. MANN. I am quite willing to reserve the point of order.

Mr. STEPHENS of Texas. I offer the amendment, which I send to the Clerk's desk.

The CHAIRMAN. The gentleman from Texas offers an amendment, which the Clerk will report.

The Clerk read as follows:

Page 23, line 20, after the word "surveyor," state the following as a committee amendment:

"Under such rules and regulations, to be prescribed by the Secretary of the Interior."

Mr. CARTER. Does the gentleman from Illinois reserve a point of order?

Mr. MANN. I made a point of order, but if the gentleman wants to be heard, I will reserve it.

Mr. CARTER. It is getting late, Mr. Chairman, and I do not care to detain the House; but if there is any chance to persuade the gentleman not to insist on his point of order, I should like to plead with him.

Mr. MANN. I can not say. The gentleman has so often persuaded me against my better judgment that he might be able to do it again, although I have a pretty firm conviction on this subject at this time.

Mr. CARTER. I have not the remotest idea that I shall be able to convince the gentleman this time, because this item involves a subject about which the gentleman and I sometimes disagree. A subject, in fact, which I dislike to discuss, and which I presume the exigencies of the occasion demand that I speak of as sparingly as possible, and that is the administration of Indian affairs by the present régime.

On the 19th day of last February there was placed on the statute books an act providing for the appraisement and sale of the surface of the segregated mineral lands in the Choctaw Nation, in Oklahoma. This land had already been appraised once, and for that reason I opposed its reappraisement. Moreover, I felt sure that the very thing would happen that has happened; but out of deference to Members older than myself in service both on the committee and in this House, I agreed to the appointment of three appraisers at a certain stipulated compensation.

These three appraisers were appointed by the Secretary of the Interior, but not until almost two months after the act had become a law, and this in the face of the fact that the Secretary of the Interior knew these three gentlemen had only six months in which to complete the job. The three appraisers established their office at McAlester, Okla., and proceeded until the time expired within which they were to appraise the land. They then asked for an extension of time, which was very graciously granted by this Congress in the last Indian appropriation act. These three elegant gentlemen again proceeded with the appraisement of this land—that is, they say they proceeded—but notwithstanding the fact that there were less than 450,000 acres to be appraised, the time again expired with nothing whatever accomplished, except a fraudulent appraisement, as charged by the Indian Office, in Oklahoma for the making of which charges were brought against the appraisers and in the face of which they resigned without trial.

The Secretary then appointed, or now proposes to appoint, three other appraisers if we will give him the authority, but, Mr. Chairman, it seems to me that we have had enough of this horseplay for political purposes. It seems to me that there should be an end to any such tomfoolery as has been carried on by such political henchmen as these at the expense of the Indian people in Oklahoma. The present Secretary of the Interior is said to be a conservationist, and I believe that is true, for he has successfully conserved the interests of Republican politicians by the use of the funds of the Five Civilized Tribes ever since he has been in office, but he has done practically nothing toward the conservation of these funds or winding up of the tribal affairs except what has been forced upon him by this Congress.

The man, John G. Joyce, who is named in this bill, is one of the very few men who have been connected with Indian affairs in Oklahoma in the past against whom no charges of either incompetency or corruption have been lodged. His work has been clean. It has always been done expeditiously, and I believe even the authorities in charge of Indian affairs at Muskogee will give him a perfectly clean bill of health as to ability, competency, and integrity. The only objection that might be found to him, even by succeeding administrations, is that he is a rabid Republican.

Mr. MILLER. What was that adjective which the gentleman used?

Mr. CARTER. Rabid. I am speaking of an Oklahoma Indian official now; that might not apply to the gentleman from Minnesota.

Mr. MILLER. I never heard of a "rabid" Republican.

Mr. CARTER. The gentleman has not had the privilege of association with the Oklahoma brand. This gentleman, Mr. Joyce, is now in possession of all the information he needs, I think, to make the reappraisement of the agricultural and grazing lands. He has been over them recently and has surveyed them for appraisement purposes. I believe he could do it much more cheaply and much more expeditiously than anyone else could. I think the authorities at Muskogee would verify this statement.

Mr. MILLER. Will the gentleman yield right there?

Mr. CARTER. Yes.

Mr. MILLER. We have discussed this before. I presume it will go out on a point of order.

Mr. CARTER. I had hoped that it would not.

Mr. MILLER. I suppose the only advantage in this discussion is to get some information that will be of use in the future. As I stated when the gentleman was before the committee, it seemed to me that there were not sufficient records and data in Mr. Joyce's office to enable him to make this appraisal and report. It seems to me if anything is to be done to dispose of this very perplexing and sad matter, as the gentleman has characterized it, we ought to have some kind of a reappraisement, and some appropriation to permit the securing of additional data upon which to make the reappraisement. If I have not been correctly informed I shall be glad to have the gentleman discuss at some length the question of how much data Mr. Joyce has, and why he thinks he could now make such a reappraisement.

Mr. CARTER. Mr. Joyce has been over almost every acre of the land except that which is close enough to town sites to make it valuable for town-site purposes. He has already placed a valuation on practically all of the agricultural and grazing lands.

The CHAIRMAN. The time of the gentleman from Oklahoma has expired.

Mr. CARTER. I ask for five minutes more.

The CHAIRMAN. Without objection, it is so ordered.

Mr. CARTER. I ask unanimous consent that I may have five minutes more.

Mr. STEPHENS of Texas. I have no objection, if we can close the debate at the end of the five minutes.

The CHAIRMAN. The gentleman from Oklahoma asks unanimous consent for five minutes more, and the gentleman from Texas [Mr. STEPHENS] asks that at the end of that time the debate on this paragraph be closed. Is there objection?

There was no objection.

Mr. MILLER. Has he made an appraisement of some of these lands in the vicinity of South McAlester?

Mr. CARTER. I just said he has not appraised anything which is near enough to a town to be valuable for town-site purposes.

Mr. MILLER. The commissioners have performed some work that has brought criticism and hostility upon them, in the mat-

ter of appraising certain tracts of land near South McAlester. How could Mr. Joyce go ahead now and make an appraisement of such very valuable lands as these, which are the most valuable of the lands he would have to appraise, without getting some additional data? He certainly could not base his estimates on the report of the commissioners, because a prima facie case is made out against that report.

Mr. CARTER. There is already an appropriation of $30,000.

Mr. MILLER. Has it not all been used?

Mr. CARTER. I assume that about one-half of it has been used.

Mr. BURKE of South Dakota. The amount appropriated was $50,000.

Mr. CARTER. My recollection is that it was reduced to $30,000.

Mr. BURKE of South Dakota. My recollection is that $15,000 was expended by the appraisers, who did not accomplish anything.

Mr. CARTER. I think that is true, and that would leave $15,000 with which to complete the work.

Mr. MILLER. If $30,000 was needed in the first place to make the appraisement, and $15,000 was spent without accomplishing anything, how are you going to make $15,000 complete the appraisement?

Mr. CARTER. I think if the gentleman understood the character of the Oklahoma Indian officials he would know that one good man can always be depended upon to do the work in about one-third the time and for one-tenth the cost that three men can do it. I feel sure that if this man, who all agree is one of the most competent men in the Indian service, is given charge of this work that the work will be expeditiously, correctly, and economically completed for this sum.

Mr. MILLER. Will he have it done under his supervision and with additional machinery and time?

Mr. CARTER. If the point of order is withdrawn a committee amendment will be offered directing the work to be done by the surveyor in chief, under rules and regulations to be prescribed by the Secretary of the Interior. The omission of this language was an oversight.

Mr. MILLER. It has always been one of the fundamental beliefs that when you have an appraisal of real estate there should be three appraisers. In the laws of all the States providing for appraisement of lands, like guardianship cases, where land is taken for public purposes under eminent domain, and all matters of that kind, the provision is that there shall be three appraisers.

Mr. CARTER. That has not been true in Oklahoma. We only had two appraisers for the appraisal of the allotted lands. Furthermore, I call attention to the fact that every acre of this land has been appraised before, under the direction of the Secretary of the Interior, and that something like 3,000,000 acres of land has been sold under this original appraisement which these lands had at a past date; why, then, all this ado about additional appraisement?

Mr. BURKE of South Dakota. Will the gentleman permit one question?

Mr. CARTER. Certainly.

Mr. BURKE of South Dakota. Without particular reference to this item, I would like to ask the gentleman if he believes it is good legislation to name some particular individual to do something of this kind?

Mr. CARTER. The Secretary of the Interior has had his innings at the appointing of political henchmen to appraise these lands. He pondered and equivocated for almost two months, totally ignoring good Indian applicants who would have done the work conscientiously and expeditiously and who, since their salaries were drawn from the Indian funds, should have been given preference, finally letting his favor fall upon three men, all of whom have admitted their corruption by resigning under charges of fraud.

I would not object to striking out the name of John G. Joyce if that would satisfy the sensibilities of any Member, but I insist that this work must be done by some one who is competent and reliable, and such a man seems to have been utterly unable to find favor with the present powers that be.

It has now been almost a year since the appraisement of these lands was provided, and not one single acre has yet been offered for sale. How long, O Lord, will the present Republican administration hold up the settlement of the affairs of the Five Civilized Tribes and clog the wheels of commerce and progress in our State? What all the people of our State want—Indians and whites alike—is to get these appraisements and sales accomplished as quickly and as cheaply as possible and without any scandal, if you please, as to fraudulent appraisements. And unless some plan can be formulated which will give us assurance of this, then I think we might as well wait until after the 4th of March, when we hope to have a good business administration which will conduct its work upon the grounds of benefits to all the people rather than of satisfying the political organization of some particular party.

The CHAIRMAN. The time of the gentleman from Oklahoma has again expired.

Mr. MANN. Mr. Chairman, the item in the bill proposes to amend two existing laws. The law now provides that the appraisement and classification shall be completed by the 1st of last December, I think, by the appraisers appointed through the Interior Department by the Secretary of the Interior. It is proposed here to amend these laws so as to provide that the clasisfication and appraisement shall be made by a particular individual, not later than four months after the passage of this act. That, of course, extends the time for making the appraisement until the 1st of July, where it is now fixed by law as the 1st of December. I presume the appraisal ought to be made, if it has not been made. I can imagine that there are cases where Congress may specifically provide that a particular individual shall perform a certain function. Usually that is where everybody in the legislative body is familiar with the person named. With the greatest respect to my friend from Oklahoma who has suggested this name, I do not know whether his judgment in reference to this man is any better than that of the Secretary of the Interior in appointing the appraisers, and it seems to me it is not a wise change of law to provide, where the law authorizes the appointment of three men to make classification and appraisement, to name a particular individual and say that he shall make the classification and appraisement.

I have less hesitation in making this statement because the gentleman may get the next Secretary of the Interior, who will probably be under the thumb of the distinguished gentleman from Oklahoma, to do whatever he pleases.

Mr. CARTER. Will the gentleman yield?

Mr. MANN. Yes.

Mr. CARTER. Mr. Chairman, I do not desire to get anybody under my thumb. What I expect to do is to get out from under the thumb of the Secretary of the Interior.

Mr. MANN. I did not say that the gentleman would get anybody under his thumb. I said the distinguished gentlemen from Oklahoma would probably have the next Secretary of the Interior under their thumb to do the things like this. I make the point of order, Mr. Chairman.

The CHAIRMAN. The provision on its face proposes to amend existing law, and therefore is obnoxious to the rule. The point of order is therefore sustained.

The Clerk read as follows:

For support and education of 600 Indian pupils, including native pupils brought from Alaska, at the Indian school, Salem, Oreg., and for pay of superintendent, $102,000; for general repairs and improvements, $9,000; in all, $111,000.

Mr. HAWLEY. Mr. Chairman, I move to strike out of line 4, page 25, the sum "$9,000" and insert in lieu thereof "$15,000."

The CHAIRMAN. The Clerk will report the amendment.

The Clerk read as follows:

Amend, page 25, line 4, by striking out "$9,000" and inserting in lieu thereof "$15,000."

Mr. STEPHENS of Texas. Mr. Chairman, I make a point of order.

Mr. HAWLEY. I submit that it is not subject to a point of order, as it is only an increase in the amount.

Mr. STEPHENS of Texas. I did not catch the purport of the amendment, and I will withdraw the point of order.

Mr. HAWLEY. Mr. Chairman, the purpose of this amendment, which increases the amount for repairs and improvements by $6,000, is to provide for an adequate water system and supply for the Chemawa Indian school, a school that has between 600 and 700 pupils and a number of employees. At my request the superintendent of the school wrote me a letter about the matter.

He said:

The wooden tower and tank now in service are worthless for the purposes for which they were erected many years ago. The tank has been out of service for about eight years, since which time it has not been used at all, but a small one, holding a few hundred barrels of water, located about 80 feet above ground, has been used in lieu thereof. The large one became contaminated in some way, and an analysis made this past fall for me by the chemist at the agricultural college at Corvallis showed that the water was reeking with typhoid germs. The tank is old, and as this condition has obtained for years, it was the opinion of the chemist that it could not be cleaned in such a manner as to render it safe for storing water again. The wooden tower is unsafe, the sills and timber being unsound, and the cost of rebuilding it would be so great that as a matter of economy and good business judgment a new steel tower of adequate height to afford fire protection should be erected. So far as the water system is concerned we are practically without any fire protection, which in a plant of this size, where most of the buildings are of wood, renders the situation serious. We need to have two more wells driven

in addition to those now in service. The water is of splendid quality, but the wells we now have are to small and not deep enough for the demands being made upon them.

Mr. FOSTER. Mr. Chairman, will the gentleman permit a question?

Mr. HAWLEY. Yes; with pleasure.

Mr. FOSTER. Where is the source of the supply of water for the town of Salem, Oreg?

Mr. HAWLEY. From a bulkhead in the river, just a little above the town.

Mr. FOSTER. Is that water used for drinking purposes?

Mr. HAWLEY. In Salem?

Mr. FOSTER. Yes.

Mr. HAWLEY. It is.

Mr. FOSTER. Has there been any complaint in reference to the water that is pumped from the river there which goes to the people of Salem?

Mr. HAWLEY. From time to time there is an occasional complaint.

Mr. FOSTER. Why is it not more economical to get that water from the city of Salem than to do as the gentleman suggests?

Mr. HAWLEY. They would have to build a pipe line for about 6 miles.

Mr. FOSTER. Is it 6 miles from Salem?

Mr. HAWLEY. Yes; and the right of way would cost many times this amount, I take it, in addition to the material and labor necessary for the construction of the pipe line. They have drilled some good deep wells and they can drill others, at moderate cost, and they can, by putting in a new pump and a new steel tank, and doing away with this tank, get an adequate water supply for the use of the school which will be entirely healthful to the Indian children. It will furthermore provide a protection against fire. Many of the buildings are old. They have some hundreds of boys and girls in them. Some are wooden buildings, and they can not get water into the second story of the buildings at the present time, in any quantity, with the system they now have. It seems to me that upon the ground of humanity and economy and of necessity this small addition to the appropriation ought to be made.

Mr. FOSTER. How far is this school from the river?

Mr. HAWLEY. That would only be a matter of guess. I would guess 2 or 3 miles.

Mr. STEPHENS of Texas. Mr. Chairman, I desire to state that two months ago I visited this school, among others on the Pacific coast. I found this an excellent school. The repairs to this water tower and tank are necessary. It was my understanding and the paper I have in my hand shows that the repairs and improvements were estimated at $10,000. We gave them $9,000, and the superintendent informed me that the main improvement they needed there was this water tank. As stated by the gentleman from Oregon, it is in bad condition, and I think that a new steel tower should be put up and the old one taken down.

Mr. HAWLEY. Is it the gentleman's opinion that this $9,000 appropriated here provides for this water tank?

Mr. STEPHENS of Texas. "General repair and improvement." That will be sufficient, in my judgment. I do not think there is any question about that. They would have a right to use that to take down the old one and put up a new one.

Mr. HAWLEY. Will the gentleman further yield?

Mr. STEPHENS of Texas. Certainly.

Mr. HAWLEY. In the book here which the committee has for its information in preparing this bill I find this statement:

> The superintendent has estimated for necessary repairs $10,000.

That would not include the purchase of the new pump and motor, the new steel tank, the steel for the frame of the tank, and the drilling of the wells. That would leave only $3,000 for the repairs of all kind, and on so large a plant as that it would be manifestly inadequate.

Mr. STEPHENS of Texas. I was informed that the well was sufficient, and that the trouble was with the tank. They said the tank and supports for the tank. That is possibly 50 feet high.

Mr. HAWLEY. They have a little tank that is just 30 feet above the ground, not high enough for protection. The well they have will fill the present tank. If a sufficiently large tank is provided, and they have to have at least one good additional well, a good service will be provided.

Mr. STEPHENS of Texas. I was not informed in regard to that.

Mr. HAWLEY. I went over the ground just a few days after the gentleman did and went particularly into the items.

Mr. STEPHENS of Texas. Was the gentleman with the superintendent?

Mr. HAWLEY. I was with the superintendent and some of the other officers of the school.

Mr. STEPHENS of Texas. This was pointed out to me as the main improvement which they desired. However, they said that on the south side of the road they desired to increase the chapel, or the general assembly hall, to add about 40 feet onto the building. That was the second request that he made.

Mr. HAWLEY. I am interested now in the adequate water supply for these students, and I hope the gentleman will let the proposed small increase be passed by the committee.

Mr. STEPHENS of Texas. Mr. Chairman, I think the statement here, for repairs and improvements, $10,000, certainly estimated for that water tank. I would be willing to strike out $9,000 and insert $10,000. That is all they asked for.

Mr. HAWLEY. The statement given here is for necessary repairs, $10,000.

Mr. STEPHENS of Texas. Suppose we add the words "including water tank."

Mr. HAWLEY. Would that provide the necessary money?

Mr. STEPHENS of Texas. I think so. I think there will be sufficient for that, but I am willing to include that language.

Mr. HAWLEY. Why not let the entire amount of $6,000 go in, but limit it by the language "or so much thereof as may be necessary"?

Mr. STEPHENS of Texas. Nine thousand dollars is carried in the bill now.

Mr. HAWLEY. That would make $15,000 in all.

Mr. STEPHENS of Texas. I think that would be in excess of the demands that were stated to me as being necessary.

Mr. HAWLEY. The superintendent of the school, in a direct reply to a telegraphic inquiry from me, writes this letter, and he sends me a telegram that the total estimate and cost of this particular improvement would be $6,000, and that the need is urgent.

Mr. STEPHENS of Texas. He did not mention whether or not he intended to use any of the other fund, did he?

Mr. HAWLEY. I do not think he was advised.

Mr. MANN. Mr. Chairman, will the gentleman yield?

Mr. STEPHENS of Texas. Yes.

Mr. MANN. I see the superintendent estimated $10,000 for repairs and improvements and $14,500 for the building.

Mr. STEPHENS of Texas. That is correct.

Mr. MANN. Of course the buildings are not provided for in the bill.

Mr. STEPHENS of Texas. No; the building was to be an addition to the hall on the south side of the road.

Mr. MANN. Perhaps the term "buildings" there included also the building of the water tower. That is the reason of my inquiry.

Mr. STEPHENS of Texas. It might be that.

Mr. HAWLEY. The term "buildings" includes an office building, a physician's cottage, and two employees' cottages.

Mr. MANN. The superintendent's estimate for repairs and improvements is $10,000. That included the watering tank if it is not included in "buildings."

Mr. STEPHENS of Texas. I would be willing, Mr. Chairman, to let the amount be $12,000, and we can arrange the matter herafter if necessary.

Mr. HAWLEY. Mr. Chairman, I will therefore modify my amendment so that $12,000 will be appropriated in this item instead of nine thousand, so providing for the water system.

The CHAIRMAN. The Clerk will report the amendment.

The Clerk read as follows:

> Page 25, line 4, strike out the figures "9,000" and insert in lieu thereof "12,000."

The CHAIRMAN. The question is on agreeing to the amendment.

The amendment was agreed to.

Mr. STEPHENS of Texas. Mr. Chairman, I ask unanimous consent to correct the totals.

The CHAIRMAN. That will be done.

Mr. MOORE of Pennsylvania. Mr. Chairman, have we passed the Pennsylvania item?

Mr. STEPHENS of Texas. There is no change made in the Pennsylvania item.

Mr. MOORE of Pennsylvania. There is no change?

Mr. STEPHENS of Texas. No.

Mr. MOORE of Pennsylvania. Then, Mr. Speaker, I ask the indulgence of the committee for one moment while I call attention to a speech in to-day's CONGRESSIONAL RECORD, on page 1087, by my distinguished colleague, the gentleman from Pennsylvania [Mr. OLMSTED]. We are considering the Indian appropriation bill and have just passed an item relating to the Carlisle Indian School, in which Mr. OLMSTED has been interested during his 16 years of service in this House. I know

of no man in the Pennsylvania delegation who has found a warmer place in the hearts of the Members of the House, or who has so endeared himself to the Pennsylvania Members as this distinguished Representative. [Applause.]

I observe with considerable regret that the speech, which I hope is not the swan song of the gentleman from Pennsylvania, starts out in its references to the Carlisle School by indicating that this is the last time he shall appear in Congress in its behalf. Mr. OLMSTED has been the devoted champion of the Carlisle School during the long period of his Membership here, and has stood by it through thick and thin, and in the stress of fair as well as of foul legislative weather.

The Indian school at Carlisle is one of those institutions of the Government of which we have a right to be proud, and the people of Pennsylvania are surely proud of the attitude which Mr. OLMSTED has taken with regard to it throughout his congressional career. And may I be permitted to speak of the references in his speech, to the characteristics of the students, both boys and girls, who have gone forth from that school, concerning some of whom I have had personal knowledge. They have developed well and have been a credit to the institution in which they were reared and have justified the attitude of the Government in making the expenditures it has made to thus improve the educational condition of these its wards.

I notice, too, that my colleague, Mr. OLMSTED, refers to some of those athletic qualities of the young men who have gone forth from this school; boys who have attained fame in the great field of baseball, and who have developed in the equally interesting field of football, and to one who has recently come through an international contest as champion of all the athletes in the world.

I recall that in this House not many months ago there sat a boy of his, the junior Marlin E. Olmsted, in whom, perhaps, he is more interested than in any other person in the world, except the fair lady who presides over his household, and that it was about the very time when the Indians were making a successful campaign in baseball. I overheard the lad, looking into the face of our distinguished colleague, say, "Father, is it not time that you should leave this House and go with me to the ball field?" The father, reluctant to leave his post of duty, said, "My boy, I can not go now; it is necessary for me to remain and save the country." And then the bright lad, looking anxiously into his father's kindly countenance, said, "Oh, shucks! Why not leave the salvation of the country to Mr. MANN?" [Laughter.]

We have reached a stage in the proceedings and a stage in the career of my distinguished colleague when we are almost about to say good-by. He has said good-by to the Carlisle School. He has left it in our keeping. And after he has gone back to private life and the practice of the law, where he will shine even more brilliantly than he did in this House, may we not intrust to Mr. MANN and the other saviors of our country the preservation and the perpetuation of the Carlisle Indian School? [Applause.]

The Clerk read as follows:

For support of Sioux of different tribes, including Santee Sioux of Nebraska, North Dakota, and South Dakota: For pay of 5 teachers, 1 physician, 1 carpenter, 1 miller, 1 engineer, 2 farmers, and 1 blacksmith (art. 13, treaty of Apr. 29, 1868), $10,400; for pay of second blacksmith, and furnishing iron, steel, and other material (art. 8 of same treaty), $1,600; for pay of additional employees at the several agencies for the Sioux in Nebraska, North Dakota, and South Dakota, $95,000; for subsistence of the Sioux, other than the Rosebud, Cheyenne, and Standing Rock Tribes, and for purposes of their civilization (act of Feb. 28, 1877), $200,000: *Provided*, That this sum shall include transportation of supplies from the termination of railroad or steamboat transportation, and in this service Indians shall be employed whenever practicable; in all, $307,000.

Mr. FOSTER. Mr. Chairman, I reserve a point of order.

Mr. FOWLER. Mr. Chairman, I reserve a point of order.

Mr. STEPHENS of Texas. Mr. Chairman, I ask unanimous consent to insert the word "River" after the word "Cheyenne," in line 3, page 21.

Mr. FOWLER. Mr. Chairman, I reserve a point of order against this paragraph for the purpose of asking the chairman of this committee by what authority of law this appropriation is requested. In fact, I desire to ask the chairman if it is not a fact that on April 29, 1868, there was a treaty made between the United States and this tribe of Indians—the Sioux—with a limitation of 20 years; and I desire further to inquire if on March 2, 1899, this treaty was not renewed between the United States and this tribe of Indians, with a limitation of 20 years? I further desire to inquire if this treaty did not expire on March 2, 1909, and is not the request in this bill for this appropriation without any authority whatever?

Mr. BURKE of South Dakota. Mr. Chairman, I hope the gentleman from Texas will yield to me, as the inquiry covers practically the whole history of the Sioux Indians.

Mr. STEPHENS of Texas. Yes; I yield to the gentleman. The question refers to the gentleman's own State and district.

Mr. BURKE of South Dakota. I will say to the gentleman from Illinois that the treaty of 1868 was limited to 20 years. A treaty was made with the Sioux Tribes in 1889 by which they ceded about 9,000,000 acres of land to the Government, and the balance of their reservation was divided into separate reservations, there being the Standing Rock, the Cheyenne River, the Rosebud, the Pine Ridge, the Crow Creek, and the Lower Brule Tribes. The treaty of 1889 in some particulars was limited to 20 years. The gentleman is right about that. But, Mr. Chairman, there is a treaty, made in 1877, that is unlimited. I have referred to it on other occasions in this House as being probably the best treaty from the Indian standpoint that was ever made with any tribe of Indians in this country, because it was not limited as to time, and under the treaty of 1877, at the time that the Black Hills were ceded to the United States, it was provided that the United States guaranteed in perpetuity to provide these Indians with subsistence, to provide them with the means of education and civilization until such time as they should be self-supporting.

So I say it is the best treaty in regard to the provisions for the subsistence, support, and civilization of Indians that has ever been made.

Mr. FOWLER. Mr. Chairman, may I inquire about the treaty of 1877? Did not that refer to the treaty of 1868, and was it not to be governed by the terms of that treaty?

Mr. BURKE of South Dakota. It had no reference to it whatever, Mr. Chairman, and was a separate and distinct treaty by itself.

I want to call the gentleman's attention to what has actually transpired under the treaty of 1877, and I may say in passing that the Indians in the last couple of years have been very much discontented and dissatisfied over the cession of the Black Hills and are now trying to repudiate the treaty of 1877 on the ground that it was not executed in accordance with the provisions of the treaty of 1868, in that it was not signed by three-fourths of the adult male members of the tribe. They think that they did not get an adequate consideration for the lands that were ceded by that treaty. They overlook the fact that they did receive a large sum of money, because we guaranteed, as I have stated, to provide them with subsistence for all time. When I came to Congress, only a few years ago, we were annually appropriating $900,000 for the item which is now $200,000, for the support and civilization of the Sioux under the treaty of 1877.

Now, the gentleman may wonder how we have been able to reduce the amount, and I am going to explain how it was done. In the treaty of 1889 it was provided that after the allotments of lands were made the surplus lands should be sold and the money should go into the Treasury and be subject to appropriation by Congress for the support and civilization of the tribes.

We have had several land openings, one affecting the Cheyenne River, one the Standing Rock, and two or three the Rosebud, so that in making the appropriation this year we make no provision for those three tribes of Indians, and we are now supporting them and providing them with subsistence out of the moneys that were received from the sale of their lands.

But as to the question of authority for the appropriation, I can only answer the gentleman that the treaty of 1877 is still in full force and effect and has not been annulled.

Mr. FOWLER. The treaty of 1868 was in force at that time, was it not?

Mr. BURKE of South Dakota. It was at the time of the making of the treaty of 1877.

Mr. FOWLER. What was the necessity for it?

Mr. BURKE of South Dakota. I do not know what the necessity was.

Mr. FOWLER. What was the occasion for the renewal of the treaty of 1889, with the limitation of 20 years?

Mr. BURKE of South Dakota. I am unable to state what the need of it was. I am simply stating the fact that the obligation of the Government for all time to care for and support these Indians was in no manner modified by the treaty of 1889. That was in the treaty of 1877, and that treaty is to-day in full force and effect; and were it not for the fact that we have required that these three tribes, which comprise about two-thirds of the general Sioux Tribe, be supported out of the moneys that have come in from the sale of their lands, we would be appropriating to-day about a million dollars a year instead of $200,000.

Mr. FOWLER. If the treaty of 1877 was not to be construed with the treaty of 1868, why should the treaty of 1868 be extended in 1889?

Mr. BURKE of South Dakota. Well, I am unable to state why. I simply know that the treaty of 1889 was limited to 20 years in some of its provisions.

Mr. FOWLER. My recollection of the treaty of 1877 is that it did not deal with this question directly, independent of the treaty of 1868, but it was with some minor points connected with this treaty or with the subject matter with which the treaty of 1868 dealt directly.

Mr. BURKE of South Dakota. It guaranteed in perpetuity, perhaps, some of the requirement of the treaty of 1868 that were limited.

Mr. FOWLER. Now, Mr. Chairman, I desire, as my colleague, Dr. FOSTER, of Illinois, reserved a point of order, and as he has perhaps some questions regarding this treaty of 1877 to propound, to yield the floor to him.

Mr. FOSTER. Mr. Chairman, the only question in my mind with reference to this matter is whether the treaty of 1868, which ran for 20 years and then was renewed for 20 years more, is in effect now or has expired.

Mr. BURKE of South Dakota. The treaty of 1889, I will say to the gentleman, has expired, and I think everything in the treaty of 1868 has expired except as it might have been specifically extended by the treaty of 1877. But the treaty of 1877 is not limited as to time.

Mr. FOSTER. In any particular?

Mr. BURKE of South Dakota. I would not say in any particular at all, but as to time it is not limited, with perhaps this exception, that the obligation was until such time as the Indians would become self-supporting.

Mr. FOSTER. Then what is the gentleman's idea of the law of 1889?

Mr. BURKE of South Dakota. I will say to the gentleman that there are two separate and distinct considerations for the two treaties. The treaty of 1877 ceded to the United States the Black Hills, and the treaty of 1889 ceded, in round numbers, 9,000,000 acres, leaving the Indians about 11,000,000 acres, which was divided into the separate reservations which I have named.

Mr. FOSTER. It occurs to me that it is a question whether this act of 1877 did cover the support of these Indians. That is the only question in my mind about this matter.

Mr. BURKE of South Dakota. I will say to the gentleman that I do not think there is any question about it. I have looked it up on several occasions. Of course, the gentleman will take into consideration the fact that there are over 20,000 Indians, and that if there was no treaty obligation whatever we would be very fortunate if we were escaping with an appropriation no larger than the one we are making. If it was a gratuity, like every other gratuity appropriation it would be subject to a point of order; but so far as the Sioux of South Dakota are concerned, we are making appropriations in accordance with the obligation incurred by reason of the treaty of 1877, which is the one that authorizes this appropriation.

Mr. FOSTER. Mr. Chairman, I think I shall make the point of order and let the Chair decide it.

Mr. BURKE of South Dakota. If the gentleman will withhold his point of order just a moment, I will ask him, in perfect good faith, if he believed that there was no authority whatever for making this appropriation would he make a point of order and leave these Indians without any protection, so far as the Federal Government is concerned? I am assuming now that there is no authority for the appropriation. Would the gentleman do that to 20,000 Indians?

Mr. FOSTER. How are these Indians situated in reference to their own property?

Mr. BURKE of South Dakota. The Indians have allotments, and very liberal ones, as I have heretofore stated. The land is only fit practically for grazing purposes, each head of a family has 640 acres, but it is mostly unproductive.

Mr. FOSTER. And they have some money in the United States Treasury?

Mr. BURKE of South Dakota. They have a trust fund of $3,000,000.

Mr. FOSTER. It seems to me that on yesterday I heard the gentleman say that the less the Indians were left to depend on the Government the better it would be for them and the more civilizing influence it would have.

Mr. BURKE of South Dakota. Yes; and I will say to the gentleman that I have found a way by which we could take care of the greater part of these Indians out of moneys that have gone into the Treasury to their credit, and I believe it is a better use to make of that money to appropriate it and expend it for their civilization rather than to civilize and educate them at the expense of the United States and store up a great fund to be disbursed at some future time.

Mr. FOSTER. Does not the gentleman think this might be a good place to put his idea into operation as to what ought to be done for the Indians? Will not the Indians be made self-reliant in South Dakota by acting in accordance with the gentleman's idea?

Mr. BURKE of South Dakota. I do not think the gentleman from Illinois [Mr. FOSTER] is sincere when he intimates that "the gentleman from South Dakota" has ever in any way indicated that he would withdraw the protection of the Government from the Indian until he has reached that stage of civilization where he is able to take care of himself.

Mr. FOSTER. It occurs to me that yesterday the gentleman did not qualify his statement in the way he does to-day.

Mr. BURKE of South Dakota. The remark I made is in the RECORD, and the gentleman can read it for himself.

Mr. FOSTER. Yesterday the gentleman wanted to get a reservation sold, and one of the reasons he mentioned was that it was a bad thing for the Indian to make him feel that there was something coming to him from the United States Government.

Mr. BURKE of South Dakota. Indefinitely.

Mr. FOSTER. That he ought to be made self-reliant. Now, to-day the gentleman comes to the House and asks Congress to appropriate for the support of these Indians.

Mr. BURKE of South Dakota. The gentleman is entirely mistaken. I do not come to the House with it. The bill is brought here by the committee.

Mr. FOSTER. I mean, the gentleman is advocating the proposition that this appropriation is proper and right.

Mr. BURKE of South Dakota. Yes; certainly.

Mr. FOSTER. That is the better way to put it. Now, does not the gentleman think it would be a good thing to begin in South Dakota to carry out the gentleman's scheme of making the Indians self-reliant?

Mr. BURKE of South Dakota. I think we have perhaps made as much progress in the civilization of the Indians in South Dakota as in any other part of the country.

Mr. FOSTER. I do not doubt that.

Mr. BURKE of South Dakota. I have stated heretofore, and I now reiterate, that just as soon as the Indian reaches a point where he is competent to take care of himself, then, I say, the sooner we withdraw all Federal aid or supervision of his affairs the better for him.

Mr. FOSTER. Does the gentleman from South Dakota think we are very much nearer to it than we were the first time that he entered this House as a Member?

Mr. BURKE of South Dakota. I certainly think so.

Mr. FOSTER. I make the point of order, Mr. Chairman, that this is not authorized by law, as the treaty of 1868 expired and was renewed for 20 years, and then became effective for 20 years more, is not in effect now.

The CHAIRMAN. The Chair will call upon the committee to produce the law which supports the amendment.

Mr. BURKE of South Dakota. I have called the attention of the Chair to the treaty of 1877.

The CHAIRMAN. Does the treaty of 1877 provide for the employment of Indians, as contemplated by this amendment?

Mr. BURKE of South Dakota. I do not think the gentleman from Illinois makes the point of order that Indian labor shall be employed wherever possible. If he bases it on that, we will have to modify it. I presume he bases the point of order on the claim that there is no authority of law for the appropriation.

Mr. FOSTER. That there is no authority of law for the appropriation.

The CHAIRMAN. The Chair will call upon the committee, if they undertake to support the bill in this respect, to furnish him the authority of law upon which they rely.

Mr. BURKE of South Dakota. I will say to the Chair that here is an appropriation that has been made for years and years, and no Member has ever raised a point of order against it. If the point of order is insisted upon, as I assume it is, then I ask unanimous consent that the matter may be passed over until we can furnish the Chair with the authority that justifies the appropriation.

Mr. STEPHENS of Texas. I have no objection. We have to rise at 5 o'clock, and I think we ought to proceed with the bill as far as possible.

The CHAIRMAN. The gentleman from Texas asks that this particular provision of the bill may be passed over without prejudice, to be returned to at the pleasure of the committee. Is there objection?

There was no objection.

The Clerk read as follows:

For support and maintenance of day and industrial schools among the Sioux Indians, including the erection and repairs of school buildings, $200,000, to be expended under the agreement with said Indians in section 17 of the act of March 2, 1889, which agreement is hereby extended to and including June 30, 1914.

Mr. FOSTER. Mr. Chairman, I reserve a point of order to that item.

Mr. BURKE of South Dakota. I hope the gentleman from Illinois will reserve the point of order.

Mr. FOSTER. I want to say that in this bill we are appropriating money for schools. I do not know how much truth there may be in all the statements that are made, but I observe that it is claimed in an article that I saw in the New York Herald, in reference to Indian affairs, that there is a school in North Dakota which the commissioner has asked to be abandoned, and yet it is impossible to get it closed up.

Now, the gentleman from South Dakota is not only familiar with the situation in his State, but I take it that with his long service on the Committee on Indian Affairs he is conversant with the situation in North Dakota. I would like to ask the gentleman if there is any foundation for the statement that we are maintaining a lot of Indian schools, especially this one, appropriating for it, merely because it has been established, and like any other Government institution located in the community, it is very hard and almost impossible to get it abandoned?

Mr. BURKE of South Dakota. Mr. Chairman, I have not seen the article that the gentleman refers to so that I do not know to what school it refers. I presume it refers to the school at Wahpeton or at Bismarck, in North Dakota.

Mr. FOSTER. It is the school at Bismarck.

Mr. BURKE of South Dakota. I think the department on one or two occasions failed to estimate for the Bismarck school, and was opposed to the appropriation for its continuation. But the committee looked upon it differently and provided for it. This appropriation that the gentleman has raised the point of order against is entirely to be expended for the reservation schools. It has no reference to a nonreservation school, such as the one at Bismarck, N. Dak.

Mr. FOSTER. I wanted to get the gentleman's idea about the school at Bismarck. I happened to be called away when the item was passed and did not get an opportunity, or I should have moved to strike it out.

Mr. BURKE of South Dakota. Last year it was represented to the committee that the school at Fort Berthold, west of Bismarck, had been burned, and that Bismarck was located centrally so that the Indian pupils could be obtained from the several reservations, and that there was a need for its continuation, and that by continuing it we might avoid rebuilding the school where the one was burned. At any rate, the committee last year appropriated for the school, notwithstanding it was not estimated for. But my recollection is that this year the school was estimated for. That school was located originally at Bismarck against the judgment of the Indian Department, and it was done at the instance of the Representatives and Senators from that State who thought that there ought to be an Indian school at Bismarck, and one was provided. But that is in another State from my State.

Mr. FOSTER. It would be natural for the Commissioner of Indian Affairs to estimate for the school this year after he had refused to estimate for it and Congress had appropriated for it.

Now, another question. Does not the gentleman think that this is possibly a good time to spend some of this money in the Treasury for the education of the Indians and let them spend their own money to become self-reliant, as long as the gentleman from South Dakota believes in that policy?

Mr. BURKE of South Dakota. As far as the Sioux Indians are concerned, I think it will be admitted that largely at my instance the Federal Treasury has been relieved from the expense of several hundred thousand dollars annually in moneys that are necessary for the care and support of the Indians by taking it out of their own funds. I have gone to the extreme, and to such an extent that at the present time the Sioux Indians are not feeling very kindly toward me. They are human.

Mr. FOSTER. I am so far away from them that I do not think they can get at me.

Mr. BURKE of South Dakota. The gentleman from Illinois ought to realize that these are the real Indians of the country; they are not mixed bloods. Most of them are full bloods, and only a few years ago were blanket Indians. I am speaking of the Sioux.

Mr. FOSTER. Does not the gentleman think that the money that they have in the Treasury is sufficient to pay the expenses of their education?

Mr. BURKE of South Dakota. I will say to the gentleman from Illinois that there are two or three of the Sioux Tribes that have no money in the Treasury, except their interest in the $3,000,000 trust fund which bears 5 per cent interest, and half of that may be expended by the Secretary of the Interior for education.

Mr. FOSTER. Of course, I realize that this is a tribal school, and upon a better footing than some of the other schools.

Mr. BURKE of South Dakota. The item in the bill to which the gentleman raises the point of order contains no appropriation that is used for any school outside of the reservation.

Mr. FOSTER. I see that there is some merit in this that is not in some of the others, but in view of the fact that we have appropriated quite a large sum of money for other schools in South Dakota, unless we can get rid of some of the other schools I shall have to insist on letting this item go out.

Mr. BURKE of South Dakota. I would like unanimous consent to have this item passed, in order that we may furnish authority of law for the appropriation.

Mr. FERRIS. Mr. Chairman, reserving the right to object, we have heard with no little pleasure about the tremendous extravagance prevailing in the State of Oklahoma, and with no little patience about the rigid economy that has been practiced in South Dakota. I want to call attention to some of the unusual, fabulous economies prevailing in that remarkable State.

They have 20,352 Indians. They are worth $41,015,702.05. They receive in Federal moneys this year $646,500. The specific appropriations for specific schools with a little handful of Indians—20,000—as follows:

Flandreau, $60,500; Pierre, $42,000; Rapid City, $53,500. The Sioux get $307,000. The Sioux again get $200,000 in a separate paragraph, unless this point of order is sustained, and following down the bill the Yanktons get $14,000.

Now, Mr. Chairman, this is the situation in the State of Oklahoma. We have one school specifically provided for and only one. In the State of Oklahoma we have approximately 120,000 Indians. In the State of South Dakota they have 20,000 Indians. Here we have an item so patent that it is subject to a point of order, that it specifically prescribes that it shall be carried along for another year. The item that has been passed by unanimous consent is clearly subject to a point of order. In 1868 they provided a treaty, which was a fat one indeed, which lasted for 20 years. That carried it along until 1889. It was then extended for 20 more years. That has expired and four years have elapsed since that time. The treaty of 1877, conjured from somewhere, the Lord only knows, is intended to obviate both of these former treaties, but it does not do it. The treaty of 1877, in article 8, prescribes as follows:

> The provisions of said treaty in 1868, except that herein modified, shall continue in full force.

I read from the treaty of 1877, which reached back and subjects those Indians to the same limitations that the treaty of 1868 imposed upon them.

I do not know what the attitude of the Chair may be; I do not know what the attitude of the House may be; but I want to say here and now, with nearly all the Indians in the United States in our State, that I shall not sit here longer and have our State muckraked and hounded without letting this House know the true facts. Our State has nearly half the Indians in the whole country, and some of the provisions in the Oklahoma section of the bill read as follows. I refer now to the tribe of Indians that reside in the county in which I live. This is to pay the agents, to pay the help, to pay the people who administer the affairs of those Indians, usually appointments made strictly from a partisan standpoint. This is the language:

> The Secretary of the Interior is hereby authorized to withdraw from the Treasury of the United States, at his discretion, the sum of $25,000, or so much thereof as may be necessary, of the funds on deposit to the credit of the Kiowa, Comanche, and Apache Tribes of Indians in Oklahoma, for the support of the agency and pay of employees maintained for their benefit.

There are two sides to this question, and there are two good, strong sides to it. We withdraw the money from the Treasury that belongs to the Indians to pay the help in my State. The gentleman from South Dakota [Mr. BURKE] has every little one-horse school in his State provided for specifically, and lugs in two items embodying $507,000 that are gratituities and nothing more, with the treaties expired more than four years, and he asks that he should be considered the great economist in behalf of Indian Affairs in his State, and that everyone shall point the finger of scorn to our State where nearly all of the Indians in the country reside. [Applause.]

Mr. MANN. Mr. Chairman, the gentleman from South Dakota [Mr. BURKE] is probably undergoing the kind of punishment which some gentlemen on the other side of the aisle think they can administer to gentlemen who do not kotow to them. The gentleman from South Dakota [Mr. BURKE] has committed the crime of expressing his opinion upon the floor of the House concerning certain frauds committed by the people of Oklahoma in their courts and elsewhere. Thereupon the distinguished

gentleman from Oklahoma [Mr. FERRIS], for the purpose of coming back at the gentleman from South Dakota——

Mr. FERRIS. Mr. Chairman, will the gentleman yield?

Mr. MANN. In a moment—and endeavoring to teach him what punishment he will receive if he does not bow before the gentleman from Oklahoma, proceeds to assault an item in the Indian appropriation bill, which has been there for years, which was reported by the gentleman's own committee without any objection on his part.

Mr. FERRIS. Yes; but I did not know that the treaty had expired at that time. I know it now.

Mr. MANN. There are many things, Mr. Chairman, which the gentleman did not know, having served on the Committee on Indian Affairs for many years, that he ought to have known. He has reported this item for years without this knowledge. I am glad that he has learned something on that subject. He will probably learn a great deal more upon other subjects if he endeavors to follow this kind of course in the House.

Mr. FERRIS. And gentlemen on that side will learn something, too.

Mr. MANN. It seems items are not to be considered on their merits, but from the standpoint of endeavoring to punish gentlemen on this side of the House, or upon that, who do not bow before him.

Mr. FERRIS. Mr. Chairman, will the gentleman yield?

Mr. MANN. I suppose the gentleman is preparing in that way to become the chairman of the Committee on Public Lands?

Mr. FERRIS. Will the gentleman yield?

Mr. MANN. Certainly.

Mr. FERRIS. Does the gentleman think it is punishing anybody to call the attention of the House to two provisions aggregating $507,000 that are carried on their face as treaty items when the treaties have expired? Is that punishing anybody?

Mr. MANN. Mr. Chairman, I think the purpose the gentleman has in view, having reported this bill himself from his committee, in calling attention to the matter at all is punishment, in an endeavor to deter gentlemen in the House from running against his wishes.

Mr. FERRIS. Not at all.

Mr. MANN. We will let that side of the House determine who shall be the chairman of the Committee on the Public Lands, but whoever is the chairman of the Committee on the Public Lands, or of any other committee of the House, will find, and gentlemen will find, that because some Member on the floor of the House properly calls attention to an item in some place which he believes ought not to be in the bill he can not, therefore, be punished by striking out items in which that particular gentleman may be interested. Even a Democratic administration will not stand for such unfair conduct as that.

Mr. FERRIS. Mr. Chairman, the gentleman, following his usual tactics, rises in his seat and seeks to chastise me as a member of the Committee on Indian Affairs because I call attention to two items which on their face are clearly subject to point of order; and not only that, but because I have called attention to two items which are being touted along in this bill as treaty items when, in fact, the treaty has expired. If the gentleman wanted to appropriate money gratuitously for these people, he should bring it in here as a gratuity. I did not know when this bill was considered in the committee that this item was subject to a point of order or I should have made the point at that time. I have since had it called to my attention. It has also been called to my attention upon the floor of the House. The gentleman from Illinois [Mr. FOWLER] and the gentleman from Illinois [Mr. FOSTER], from the gentleman's own State, make the point of order, and if the distinguished gentleman from Illinois [Mr. MANN] thinks that by badgering me and dragging in some reference to an outside and a wholly extrinsic matter he can close my mouth he is seriously mistaken.

Mr. MANN. Oh, I do not think anything could close the gentleman's mouth—not even his own head.

Mr. BURKE of South Dakota. Mr. Chairman, if the excitement has subsided, I renew my request that this item be passed along with the other item until we can have an opportunity to submit authorities to the Chair.

The CHAIRMAN (Mr. HAY). Is there objection to the request of the gentleman from South Dakota?

Mr. STEPHENS of Texas. Mr. Chairman, I have no objection.

Mr. FOWLER. Mr. Chairman, before this item is passed, I desire to say that I disclaim any idea of punishing any Member on the floor of this House in any way whatever, and if the reference of my genial colleague from Illinois [Mr. MANN] sought to include me as wanting to punish anybody, I desire to say to him in all candor that I have no disposition to punish any man on the floor of this House, here or elsewhere.

My action was prompted from a sincere desire to learn the facts. Being a new Member, and for the first time having had an opportunity to investigate these treaties, I sought to see in good faith as to whether there is any legal authority for this appropriation. And I say in conclusion, Mr. Chairman, that whenever I am accused of making any objection here other than in the interests of the people of the United States, I disclaim any such statement. [Applause.]

Mr. STEPHENS of Texas. Mr. Chairman, I yield to the gentleman from Oklahoma [Mr. CARTER] one minute.

Mr. CARTER. Mr. Chairman, I am surprised that my friend from Illinois [Mr. MANN] should take umbrage at the action of my colleague from Oklahoma [Mr. FERRIS] in the simple exercise of his right to call attention to provisions of this bill which might be subject to points of order. If the gentleman should apply this rule to himself, it would be necessary for this House to employ a professional scold to do the job.

The gentleman from Illinois [Mr. MANN] makes points of order regardless where the chips may fall. Many times have I and other Members been the victims of this gentleman's points of order on propositions of undisputed merit, as the gentleman himself will admit. Only this afternoon two propositions went out of this bill on points of order made by the gentleman from Illinois [Mr. MANN], one of them the item of $300,000 to aid the common schools of our State, the justice of which I do not think the gentleman himself will dispute. But now, because, forsooth, a gentleman from Oklahoma would simply point out similar provisions in the appropriations of some other State, the gentleman from Illinois feels called upon to read him a lecture on the good behavior of a Member of Congress.

It is passing strange, Mr. Chairman, that a gentleman of the usual astute fairness of the gentleman from Illinois [Mr. MANN] should take this partisan view of a Member's duty. It is more than passing strange that points of order made by that side of the House against the provisions of Members on this side are considered of such high merit and virtue, yet when the matter is reversed and a Member from this side presumes to even call attention to the fact that a provision defended by the gentleman on that side of the aisle is subject to a point of order it becomes a seething outrage sufficient to warrant the unjustified attack we have just heard made against my colleague, Mr. FERRIS.

Mr. STEPHENS of Texas. Mr. Chairman, I move that the committee do now rise, pending the points of order on the two last paragraphs.

The motion was agreed to.

Accordingly the committee rose; and the Speaker having resumed the chair, Mr. SAUNDERS, Chairman of the Committee of the Whole House on the state of the Union, reported that that committee had had under consideration the bill H. R. 26874, the Indian appropriation bill, and had come to no resolution thereon.

Mr. STEPHENS of Texas. I yield sufficient time for the gentleman from Oklahoma [Mr. CARTER] to make a request.

Mr. CARTER. Mr. Speaker, I ask unanimous consent to extend my remarks in the RECORD.

The SPEAKER. Is there objection? [After a pause.] The Chair hears none.

ADJOURNMENT.

Mr. STEPHENS of Texas. Mr. Speaker, I move that the House do now adjourn.

The motion was agreed to; accordingly (at 5 o'clock p. m.) the House adjourned until Wednesday, January 8, 1913, at 12 o'clock noon.

EXECUTIVE COMMUNICATIONS.

Under clause 2 of Rule XXIV, executive communications were taken from the Speaker's table and referred as follows:

1. A letter from the Secretary of War, transmitting, with a letter from the Chief of Engineers, report of examination of Lynnhaven River, Va., with a view of securing increased depth (H. Doc. No. 1244); to the Committee on Rivers and Harbors and ordered to be printed, with illustrations.

2. A letter from the Secretary of War, transmitting, with a letter from the Chief of Engineers, report of examination of Savages Creek, Va., with a view to providing a suitable channel from Chesapeake Bay to Eastville (H. Doc. No. 1247); to the Committee on Rivers and Harbors and ordered to be printed, with illustrations.

3. A letter from the Secretary of the Treasury, transmitting copy of a communication from the Secretary of the Interior submitting estimate of appropriation to be expended in continuing the relief of the Apache Indians now confined as prisoners of war at Fort Sill Military Reservation, Okla. (H. Doc. No. 1249); to the Committee on Indian Affairs and ordered to be printed, with illustrations.

4. A letter from the Secretary of War, transmitting, with a letter from the Chief of Engineers, report of examination and survey of East and West Waterways, Seattle Harbor, Wash. (H. Doc. No. 1245); to the Committee on Rivers and Harbors and ordered to be printed.

5. A letter from the Secretary of War, transmitting, with a letter from the Chief of Engineers, report of examination and survey of Nansemond River, Va., with a view to the cost of repairing and replacing dikes at or near the western branch (H. Doc. No. 1246); to the Committee on Rivers and Harbors and ordered to be printed, with illustrations.

6. A letter from the Secretary of the Treasury, transmitting reports from accounting officers, showing what officers were delinquent in rendering accounts for the fiscal year ending June 30, 1912, and list of officers found indebted to the Government who had failed to pay same into the Treasury (H. Doc. No. 1248); to the Committee on Expenditures in the Treasury Department and ordered to be printed.

7. A letter from the Secretary of State, transmitting, pursuant to law, an authentic copy of the certificate of final ascertainment of electors for President and Vice President appointed in the State of Rhode Island at the election held therein on November 5, 1912; to the Committee on Election of President, Vice President, and Representatives in Congress.

REPORTS OF COMMITTEES ON PRIVATE BILLS AND RESOLUTIONS.

Under clause 2 of Rule XIII,

Mr. SLAYDEN, from the Committee on Military Affairs, to which was referred the joint resolution (S. J. Res. 119) authorizing the Secretary of War to receive for instruction at the United States Military Academy at West Point John C. Scholtz, a citizen of Venezuela, reported the same without amendment, accompanied by a report (No. 1280), which said resolution and report were referred to the Private Calendar.

PUBLIC BILLS, RESOLUTIONS, AND MEMORIALS.

Under clause 3 of Rule XXII, bills, resolutions, and memorials were introduced and severally referred as follows:

By Mr. TAYLOR of Alabama: A bill (H. R. 27781) to quiet title to lot 5, section 33, township 14, range 18 east, Noxubee County, Miss.; to the Committee on the Public Lands.

By Mr. HAWLEY: A bill (H. R. 27782) to create the Oregon Caves National Park; to the Committee on the Public Lands.

By Mr. ASHBROOK: A bill (H. R. 27783) providing for the purchase of a site for a public building at Millersburg, in the State of Ohio; to the Committee on Public Buildings and Grounds.

By Mr. HARDWICK: A bill (H. R. 27784) for the purpose of purchasing a site and the erection of a public building at Sandersville, Ga.; to the Committee on Public Buildings and Grounds.

By Mr. SAMUEL W. SMITH: A bill (H. R. 27785) to extend W Street NW. from Georgia Avenue to Florida Avenue, District of Columbia; to the Committee on the District of Columbia.

By Mr. STEPHENS of Texas: A bill (H. R. 27786) for the relief of Turtle Mountain Chippewa Indians, and for other purposes; to the Committee on Indian Affairs.

By Mr. O'SHAUNESSY: A bill (H. R. 27787) to amend section 13 of an act entitled "An act to promote the efficiency of the militia, and for other purposes"; to the Committee on Military Affairs.

Also, a bill (H. R. 27788) to amend section 1661 of the Revised Statutes, as amended by the acts of February 12, 1887, June 6, 1900, and June 22, 1906; to the Committee on Military Affairs.

By Mr. COVINGTON: A bill (H. R. 27789) to authorize aids to navigation and other works in the Lighthouse Service, and for other purposes; to the Committee on Interstate and Foreign Commerce.

By Mr. HAYDEN: A bill (H. R. 27790) opening the surplus and unallotted lands in the Colorado River Indian Reservation to settlement under the provisions of the Carey land acts, and for other purposes; to the Committee on Indian Affairs.

By Mr. CLAYTON: A bill (H. R. 27827) to amend section 70 of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911; to the Committee on the Judiciary.

By Mr. GARRETT: Resolution (H. Res. 768) authorizing the Committee on Rules to investigate as to the advisability, practicability, and expense of installing some mechanical device for recording the vote of Members; to the Committee on Rules.

By Mr. STEPHENS of Texas: Joint resolution (H. J. Res. 378) concerning contracts with Indians of the Five Civilized Tribes; to the Committee on Indian Affairs.

By Mr. SLAYDEN: Joint resolution (H. J. Res. 379) authorizing the printing as a House document of an article entitled "Antityphoid Vaccination in the Army and in Civil Life"; to the Committee on Printing.

PRIVATE BILLS AND RESOLUTIONS.

Under clause 1 of Rule XXII, private bills and resolutions were introduced and severally referred as follows:

By Mr. ALLEN: A bill (H. R. 27791) granting an increase of pension to Charles Miller; to the Committee on Invalid Pensions.

By Mr. BOOHER: A bill (H. R. 27792) for the relief of George Welty; to the Committee on Claims.

By Mr. BROWN: A bill (H. R. 27793) granting a pension to Mary E. Paugh; to the Committee on Invalid Pensions.

Also, a bill (H. R. 27794) for the relief of the heirs of John M. Corley, deceased; to the Committee on War Claims.

By Mr. CANNON: A bill (H. R. 27795) for the relief of William H. Murphy; to the Committee on Military Affairs.

Also, a bill (H. R. 27796) granting an increase of pension to Caroline Bitterny; to the Committee on Invalid Pensions.

By Mr. CLINE: A bill (H. R. 27797) granting an increase of pension to John McLeod; to the Committee on Invalid Pensions.

By Mr. DRAPER: A bill (H. R. 27798) granting a pension to Katherine Reardon; to the Committee on Invalid Pensions.

Also, a bill (H. R. 27799) granting a pension to Henry H. Lord; to the Committee on Pensions.

Also, a bill (H. R. 27800) granting a pension to George H. La Clair; to the Committee on Pensions.

Also, a bill (H. R. 27801) granting an increase of pension to Charles La Marsh; to the Committee on Invalid Pensions.

Also, a bill (H. R. 27802) granting an increase of pension to George Merrill; to the Committee on Invalid Pensions.

By Mr. DYER: A bill (H. R. 27803) granting a pension to John G. Hunt; to the Committee on Invalid Pensions.

Also, a bill (H. R. 27804) granting a pension to Horace Clive Gray; to the Committee on Pensions.

Also, a bill (H. R. 27805) granting an increase of pension to William H. Thomas; to the Committee on Invalid Pensions.

By Mr. ESCH: A bill (H. R. 27806) granting a pension to Mary MacArthur; to the Committee on Invalid Pensions.

By Mr. GOOD: A bill (H. R. 27807) granting a pension to Marcella Rowan; to the Committee on Invalid Pensions.

By Mr. GRAHAM: A bill (H. R. 27808) granting an increase of pension to James Anderson; to the Committee on Invalid Pensions.

By Mr. HAWLEY: A bill (H. R. 27809) granting an increase of pension to Robert N. Varley; to the Committee on Invalid Pensions.

By Mr. HOWELL: A bill (H. R. 27810) granting an increase of pension to Thomas S. Gunn; to the Committee on Pensions.

By Mr. JOHNSON of South Carolina: A bill (H. R. 27811) for the relief of John C. Hardeman; to the Committee on Claims.

By Mr. KENT: A bill (H. R. 27812) for the relief of Joseph A. Stevenson; to the Committee on Military Affairs.

By Mr. LEWIS: A bill (H. R. 27813) granting a pension to William Gurnett; to the Committee on Invalid Pensions.

By Mr. LITTLEPAGE: A bill (H. R. 27814) for the relief of Payton J. Boggs; to the Committee on Military Affairs.

Also, a bill (H. R. 27815) for the relief of the trustees of the Methodist Episcopal Church of Malden, W. Va.; to the Committee on War Claims.

By Mr. PALMER: A bill (H. R. 27816) granting a pension to Edward J. Hart; to the Committee on Pensions.

By Mr. PARRAN: A bill (H. R. 27817) granting a pension to Golda M. Morrison; to the Committee on Pensions.

By Mr. SMITH of New York: A bill (H. R. 27818) granting an increase of pension to William H. Chapman; to the Committee on Invalid Pensions.

Also, a bill (H. R. 27819) granting restoration of pension to Mary Wolbert, now Smith; to the Committee on Invalid Pensions.

Also, a bill (H. R. 27820) granting restoration of pension to Eliza Steele, now Riehl; to the Committee on Invalid Pensions.

By Mr. SAMUEL W. SMITH: A bill (H. R. 27821) granting a pension to John V. Gilbert; to the Committee on Invalid Pensions.

Also, a bill (H. R. 27822) granting an increase of pension to Schuyler Van Tassell; to the Committee on Invalid Pensions.

By Mr. TAYLOR of Ohio: A bill (H. R. 27823) granting an increase of pension to Olive B. Helms; to the Committee on Invalid Pensions.

By Mr. WHITE: A bill (H. R. 27824) granting an increase of pension to William E. Reymer; to the Committee on Invalid Pensions.

By Mr. WILSON of Illinois: A bill (H. R. 27825) granting a pension to Etta Gretter; to the Committee on Invalid Pensions.

Also, a bill (H. R. 27826) granting an increase of pension to Cinderella Leversee; to the Committee on Invalid Pensions.

PETITIONS, ETC.

Under clause 1 of Rule XXII, petitions and papers were laid on the Clerk's desk and referred as follows:

By Mr. ALLEN: Petition of John T. Mack and other representatives of the Ohio daily newspapers, protesting against the passage of the publicity act of the Post Office appropriation bill, requiring all papers to publish lists of stockholders, indebtedness, etc.; to the Committee on the Post Office and Post Roads.

By Mr. ASHBROOK: Petition of the Pennsylvania Sealers' Conference at Harrisburg, Pa., favoring the passage of House bill 23113, fixing a standard barrel for the shipment of fruits, vegetables, etc.; to the Committee on Coinage, Weights, and Measures.

Also, petition of the Baltimore Clothing Co. and 17 other merchants of Uhrichsville, Ohio, favoring the passage of legislation giving the Interstate Commerce Commission further power toward controlling the express companies; to the Committee on the Judiciary.

By Mr. BOOHER: Petition of Rev. J. H. Weaver and 27 other citizens of Fairfax, Mo., favoring the passage of the Kenyon-Sheppard liquor bill preventing the shipment of liquor into dry territory; to the Committee on the Judiciary.

Also, petition of St. Joseph Division, No. 141, Order of Railway Conductors, protesting against the passage of House bill 20487, the workmen's compensation bill; to the Committee on the Judiciary.

By Mr. BORLAND: Petition of women of Missouri, asking that the act prohibiting the sale of light wine and beer on military reservations be repealed; to the Committee on Military Affairs.

By Mr. BROWN: Papers to accompany a bill granting a pension to Mary E. Paugh; to the Committee on Invalid Pensions.

Also, papers to accompany bill for the relief of heirs of John M. Corley; to the Committee on War Claims.

By Mr. CLARK of Florida: Petition of Rev. George A. Blount and other citizens of Bradford County, Fla., favoring the passage of the Kenyon liquor bill (S. 4043) preventing the shipment of liquor into dry territory; to the Committee on the Judiciary.

By Mr. DRAPER: Petition of the State Camp of New York, Patriotic Order Sons of America, favoring the passage of Senate bill 3175, for the restriction of immigration; to the Committee on Immigration and Naturalization.

By Mr. DYER: Papers to accompany bill granting a pension to John G. Hunt; to the Committee on Pensions.

Also, petition of Lewis B. Miller, St. Louis, Mo., favoring the passage of the Kenyon-Sheppard bill, preventing the shipment of liquor into dry territory; to the Committee on the Judiciary.

Also, petition of the Railway Business Association of New York, favoring the passage of House bill 25106, granting a Federal charter to the Chamber of Commerce of the United States of America; to the Committee on the Judiciary.

Also, petition of the Army and Navy Union of the United States of America, St. Louis, Mo., favoring the passage of House bill 19800, granting a pension to the veterans of the Indian wars; to the Committee on Pensions.

Also, papers to accompany the bill granting a pension to William H. Thomas; to the Committee on Invalid Pensions.

Also, papers to accompany the bill granting a pension to Horace Clive Gray; to the Committee on Pensions.

Also, papers to accompany the bill (H. R. 11071) granting a pension to Laura Hilgeman; to the Committee on Pensions.

Also, papers to accompany the bill (H. R. 10186) granting a pension to Anna Buhrman; to the Committee on Invalid Pensions.

By Mr. FULLER: Petition of William Dewatt, Monongahela, Pa., favoring the passage of House bill 1339, to increase the pensions of veterans who lost a limb in the Civil War; to the Committee on Invalid Pensions.

By Mr. GOLDFOGLE: Petition of the Grand Rapids Association of Commerce, Grand Rapids, Mich., favoring the passage of Senate bill 957, for the regulation of bills of lading; to the Committee on Interstate and Foreign Commerce.

Also, petition of the Maryland and District of Columbia Launderers' Association, favoring the passage of House bill 25085, requiring the labeling and tagging of all fabrics and articles of clothing intended for sale; to the Committee on Interstate and Foreign Commerce.

Also, petition of the Lake Michigan Sanitary Association, Chicago, Ill., favoring the passage of legislation making an appropriation for the investigation of the pollution of the waters of the Great Lakes; to the Committee on Appropriations.

Also, petition of the general executive committee of the Railway Business Association of New York, favoring the passage of House bill 25105, granting a Federal charter to the Chamber of Commerce of the United States of America; to the Committee on the Judiciary.

Also, petition of the Federation of Jewish Farmers of America, favoring the passage of legislation creating a system of farmers' credit unions; to the Committee on Banking and Currency.

Also, petition of the American Automobile Association, New York, favoring the passage of legislation giving Federal aid to good-road building; to the Committee on Agriculture.

By Mr. HELGESEN: Petition of citizens of over 20 towns of North Dakota, favoring the passage of the Kenyon liquor bill (H. R. 4043), to prevent the shipment of liquor into dry territory; to the Committee on the Judiciary.

By Mr. KINKAID of Nebraska: Petition of residents of Merna and Smithfield, Nebr., protesting against the passage of any bill enlarging the present parcel-post bill; to the Committee on the Post Office and Post Roads.

Also, petition of residents of 14 towns in the sixth district of Nebraska, favoring the passage of legislation requiring all concerns doing a mail-order business to contribute their share to the fund to develop the local community, the county, and the State; to the Committee on Interstate and Foreign Commerce.

By Mr. KINDRED: Petition of the New York Produce Exchange, New York, N. Y., and the general executive committee of the Railway Business Association, favoring the passage of House bill 25106, to incorporate the Chamber of Commerce of the United States of America under a Federal charter; to the Committee on the Judiciary.

By Mr. LEVY: Petition of the National Indian War Veterans, Denver, Colo., favoring the passage of legislation granting pensions to the veterans of the Indian wars; to the Committee on Pensions.

Also, petition of the Chamber of Commerce of the State of New York, protesting against the passage of Senate bill 7208, proposing several changes in the law of the United States relating to the carriage of cargo by sea; to the Committee on Interstate and Foreign Commerce.

By Mr. MOTT: Petition of the National Indian War Veterans, Denver, Colo., favoring the passage of bill granting pensions to veterans of the Indian wars; to the Committee on Pensions.

Also, petition of the New York Civic League, favoring the passage of legislation prohibiting the shipment of liquor into dry territory; to the Committee on the Judiciary.

Also, petition of the Federation of Jewish Farmers of America, favoring the passage of legislation creating a system of farmers' credit unions; to the Committee on Banking and Currency.

Also, petition of the Vermont Association of Sealers of Weights and Measures, and the Pennsylvania Sealers' Conference, Harrisburg, Pa., favoring the passage of House bill 23113, fixing a standard barrel for the shipment of fruits, vegetables, etc.; to the Committee on Ways and Means.

Also, petition of the Railway Business Association, New York, and the Chamber of Commerce of the United States of America, Washington, D. C., favoring the passage of House bill 25106, granting a Federal charter to the Chamber of Commerce of the United States of America; to the Committee on the Judiciary.

Also, petition of the Association of National Advertising Managers, protesting against the passage of section 2 of the Oldfield patent bill prohibiting the fixing of prices by manufacturers of patent goods; to the Committee on Patents.

Also, petition of residents of Watertown, N. Y., favoring the passage of House bill 26277, to establish a United States court of patent appeals; to the Committee on Patents.

By Mr. REILLY: Petition of the Vermont Association of Sealers of Weights and Measures, favoring the passage of bill fixing a standard barrel for fruits, vegetables, etc.; to the Committee on Ways and Means.

Also, petition of the National Indian War Veterans, Denver, Colo., favoring the passage of legislation granting pension to veterans of the Indian wars; to the Committee on Pensions.

By Mr. TILSON: Petition of the general executive committee of the Railway Business Association, favoring the passage of House bill 25106, granting a Federal charter to the Chamber of

Commerce of the United States of America; to the Committee on the Judiciary.

Also, petition of the board of agriculture of the State of Connecticut, protesting against the passage of any legislation reducing the present tax on oleomargarine; to the Committee on Agriculture.

By Mr. TOWNER: Petition of the Woman's Christian Temperance Union and 300 citizens of Allenton, Iowa, favoring the passage of the Kenyon "red light" injunction bill to clean up Washington for the inauguration; to the Committee on the District of Columbia.

By Mr. WICKERSHAM: Petition of residents of Ketchikan, Alaska, favoring the passage of legislation to prevent the setting of fish traps in the tidal waters of Alaska; to the Committee on the Territories.

SENATE.

WEDNESDAY, *January 8, 1913.*

Prayer by the Chaplain, Rev. Ulysses G. B. Pierce, D. D.

The Journal of yesterday's proceedings was read and approved.

ELECTORS FOR PRESIDENT AND VICE PRESIDENT.

The PRESIDENT pro tempore (Mr. BACON) laid before the Senate a communication from the Secretary of State, transmitting, pursuant to law, authentic copies of the certificates of ascertainment of electors for President and Vice President appointed in the States of South Dakota and Washington at the elections held in those States November 5, 1912, which were ordered to be filed.

CONTINGENT EXPENSES, TERRITORY OF ALASKA (S. DOC. NO. 995).

The PRESIDENT pro tempore laid before the Senate a communication from the Secretary of the Treasury, transmitting a letter from the Secretary of the Interior submitting a revised estimate of appropriation for contingent expenses, Territory of Alaska, for the fiscal year ending June 30, 1914, in the sum of $9,745, which, with the accompanying papers, was referred to the Committee on Appropriations and ordered to be printed.

HANOVER BAPTIST CHURCH OF VIRGINIA V. UNITED STATES (S. DOC. NO. 996.)

The PRESIDENT pro tempore laid before the Senate a communication from the assistant clerk of the Court of Claims, transmitting a certified copy of the findings of fact and conclusion filed by the court in the cause of the Trustees of the Hanover Baptist Church, of King George County, Va., *v.* United States, which, with the accompanying paper, was referred to the Committee on Claims and ordered to be printed.

IMPEACHMENT OF ROBERT W. ARCHBALD.

Mr. CLARK of Wyoming. I introduce the order which I send to the desk.

The PRESIDENT pro tempore. The order will be read.

The order was read, as follows:

Ordered, That on this day, and until otherwise ordered, the daily sittings of the Senate in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall commence at 1 o'clock in the afternoon and continue until 6 o'clock in the afternoon.

The PRESIDENT pro tempore. Without objection, the order will be considered as made by the Senate.

PETITIONS AND MEMORIALS.

The PRESIDENT pro tempore presented the memorial of Rev. James A. McFaul, bishop of Trenton, N. J., remonstrating against the adoption of the proposed literacy test for immigrants, which was referred to the Committee on Immigration.

Mr. KERN presented a resolution adopted by the Indiana conference of the Methodist Episcopal Church, in session at Jeffersonville, Ind., favoring the passage of the so-called Kenyon-Sheppard interstate liquor bill, which was ordered to lie on the table.

Mr. WARREN presented resolutions adopted by the Fremont County Wool Growers' Association, of Wyoming, favoring the enactment of legislation authorizing cooperation with the several States for the extermination of wild predatory animals, which were referred to the Committee on Agriculture and Forestry.

Mr. OLIVER presented a petition of sundry citizens of Penns Park, Pa., and a petition of members of the Erie Methodist Episcopal Conference, of Erie, Pa., praying for the passage of the so-called Kenyon-Sheppard interstate liquor bill, which were ordered to lie on the table.

Mr. JOHNSON of Maine (for Mr. GARDNER) presented petitions of members of the Men's Bible Class of the Free Baptist Church, Island Falls; of members of Cumberland District Lodge of Good Templars, of Portland; and of sundry citizens of Farmington, South China, and North Anson, all in the State of Maine, praying for the passage of the so-called Kenyon-Sheppard interstate liquor bill, which were ordered to lie on the table.

He also presented a memorial of sundry citizens of Portland, Me., remonstrating against the enactment of legislation to further restrict immigration, which was referred to the Committee on Immigration.

Mr. WETMORE presented a petition of members of the Rhode Island State Federation of Women's Clubs, praying for the passage of the so-called Page vocational education bill, which was ordered to lie on the table.

AGRICULTURAL ENTRIES ON COAL LANDS.

Mr. CLAPP, from the Committee on Indian Affairs, to which was referred the bill (S. 7976) to amend section 1 of an act entitled "An act to provide for agricultural entries on coal lands," approved June 22, 1910, asked to be discharged from its further consideration and that it be referred to the Committee on Public Lands, which was agreed to.

THE JUDICIAL CODE.

Mr. CLARK of Wyoming. Under the direction of the Committee on the Judiciary, and pursuant to law, I submit from that committee the Judicial Code of the United States in force January 1, 1912, annotated; and in connection therewith I report a concurrent resolution providing for the printing of the code, which I ask may be read, and, together with the manuscript, referred to the Committee on Printing.

The concurrent resolution (S. Con. Res. 34) was read, and, with the accompanying manuscript, referred to the Committee on Printing, as follows:

Resolved by the Senate (the House of Representatives concurring), That there be printed 25,000 copies of the Judicial Code of the United States prepared under the direction of the Judiciary Committee of the Senate, 10,000 copies of which shall be for the use of the Senate and 15,000 for the use of the House of Representatives.

BILLS AND JOINT RESOLUTION INTRODUCED.

Bills and a joint resolution were introduced, read the first time, and, by unanimous consent, the second time, and referred as follows:

By Mr. BORAH:

A bill (S. 8021) extending the number of annual payments to entrymen upon reclamation projects; to the Committee on Irrigation and Reclamation of Arid Lands.

A bill (S. 8022) granting an increase of pension to Harman Eastman (with accompanying paper); and

A bill (S. 8023) granting a pension to Mary Coleman (with accompanying paper); to the Committee on Pensions.

By Mr. KERN:

A bill (S. 8024) granting an increase of pension to Wilson Wells (with accompanying papers); and

A bill (S. 8025) granting an increase of pension to Edward W. Anderson (with accompanying paper); to the Committee on Pensions.

By Mr. TOWNSEND (for Mr. SMITH of Michigan):

A bill (S. 8026) granting a pension to Allen B. Be Dell; to the Committee on Pensions.

A bill (S. 8027) to remove the charge of desertion from the military record of Henry Fuller; to the Committee on Military Affairs.

By Mr. BURNHAM:

A bill (S. 8028) for the relief of the legal representatives of the estate of Henry H. Sibley, deceased; to the Committee on Claims.

By Mr. CATRON:

A bill (S. 8029) for the relief of Frank L. Rael, heir of Francisco Rael, deceased; to the Committee on Claims.

By Mr. SWANSON:

A bill (S. 8030) for the construction of a public building at Warrenton, Va.; to the Committee on Public Buildings and Grounds.

By Mr. O'GORMAN:

A bill (S. 8031) providing for the presentation of medals to all surviving soldiers of the Battle of Gettysburg; to the Committee on Military Affairs.

By Mr. JOHNSON of Maine:

A bill (S. 8032) for the relief of Walter Whitney (with accompanying papers); to the Committee on Military Affairs.

By Mr. BRANDEGEE:

A bill (S. 8033) to authorize the Connecticut River Co. to relocate and construct a dam across the Connecticut River above the village of Windsor Locks, in the State of Connecticut; to the Committee on Commerce.

By Mr. GALLINGER:

A joint resolution (S. J. Res. 148) authorizing the granting of permits to the committee on inaugural ceremonies on the oc-